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No. 81-2110

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Appellant

v.

MAYOR AND COUNCIL OF THE CITY OF CAMDEN AND THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees

BRIEF OF APPELLANT

On Appeal from the Supreme Court of New Jersey

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QUESTIONS PRESENTED

1. Does a municipal ordinance which excludes all out-of-state residents from access to a significant portion of private employment opportunities within the municipality violate the Privileges and Immunities Clause of the United States Constitution?

2. Does a municipal ordinance which requires an applicant to have been a municipal resident for a year before being granted access to a significant portion of private employment opportunities violate the Equal Protection Clause of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES CITED	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	10
ARGUMENT	15
I. BY EXCLUDING OUT-OF-STATE RESIDENTS FROM ACCESS TO FORTY PER CENT OF THE JOBS WITH PRIVATE EMPLOYERS ON PUBLIC WORKS CONSTRUCTION PROJECTS, THE CAMDEN RESIDENT HIRING QUOTA VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.	15
A. The Constitutional Ban on Discrimination Against Out-of-State Residents Embodied in the Privileges and Immunities Clause Was Adopted as an Instrument of National Unification	15
B. A Core Concern of the Privileges and Immunities Clause Is the Exclusion of Out-of-State Residents Seeking Access to Private Employment Opportunities within the City of Camden	20
C. A Local Ordinance Which Discriminates Against Out-of-State Residents by Denying Them Access to a Significant Portion of the Jobs Offered by Private Employers Engaged in Public Works Construction Projects Is Not Immune From	

TABLE OF CONTENTS—*(Continued)*

Page

Review under the Privileges and Immunities Clause Merely Because It Is Enacted by a Municipality Rather Than the State 26

D. The Camden Ordinance Is Invalid Because There Is No Proof That Nonresidents Constitute a "Peculiar Source of the Evil" at Which the Ordinance Is Aimed and That the Discrimination Practiced Bears a Substantial Relationship to the Particular "Evil" That the Nonresidents Are Said to Present 35

E. Even If This Court Finds That Camden Is Acting as a Market Participant, Camden's Exclusion of Out-of-State Residents from Access to Employment Opportunities Is Not Immunized from Scrutiny Under the Privileges and Immunities Clause 42

II. THE CAMDEN ORDINANCE'S ONE YEAR DURATIONAL RESIDENCY REQUIREMENT FOR PREFERENCE FOR AT LEAST FORTY PER CENT OF THE JOBS WITH PRIVATE CONTRACTORS ON PUBLIC WORKS CONSTRUCTION PROJECTS VIOLATES THE EQUAL PROTECTION CLAUSE, BECAUSE THE REQUIREMENT PENALIZES THE FUNDAMENTAL RIGHT OF INTERSTATE TRAVEL 45

A. The Durational Residency Requirement Imposed by the Camden Ordinance Penalizes the Fundamental Right of Interstate Travel 45

B. The Camden Ordinance's Durational Residency Requirement Is Not Necessary to Promote a Compelling State Interest . 57

CONCLUSION 64

TABLE OF AUTHORITIES CITED

Cases: Page

Afroyim v. Rusk, 387 U.S. 253 (1967) 63

Andre v. Board of Trustees of Village of Maywood, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) 55, 56

Austin v. New Hampshire, 420 U.S. 656 (1975) . 13,15, 18, 19, 20, 21, 30, 34, 44

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) 21, 25

Barber v. Barber, 62 U.S. (21 How.) 582 (1859) .. 62

Baxter v. Birkins, 311 F.Supp. 222 (D. Colo. 1970) 49

Berg v. City of Minneapolis, 274 Minn. 277, 143 N.W. 2d 200 (1966) 58, 59

Besaw v. Affleck, 333 F.Supp. 775 (D.R.I. 1971) .. 49

Borough of Sayre v. Phillips, 148 Pa. 482, 24 A.76 (1892) 27

Brimmer v. Rebman, 138 U.S. 78 (1891) 34

Brown v. Anderson, 202 F.Supp. 96 (Alaska 1962) . 23

Butler v. Breyer, 355 F.Supp. 405 (S.D. Ohio 1972) 49

C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York, 412 F.Supp. 1164 (1976), *aff'd mem. sub. nom., Lefkowitz v. C.D.R. Enterprises Ltd.*, 429 U.S. 1031 (1977) 60

Califano v. Torres, 435 U.S. 1 (1978) 47

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Chimento v. Stark, 353 F.Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973) 64

City of Rome v. United States, 446 U.S. 156 (1980) 43

TABLE OF AUTHORITIES CITED—*(Continued)*

Cases:	Page
City of Trenton v. New Jersey, 262 U.S. 182 (1923)	27
Clements v. Fashing, ____ U.S. ____, 102 S.Ct. 2836 (1982)	62
Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970)	50
Commonwealth v. Snyder, 182 Pa. 630, 38 A.356 (1897)	33
Construction and General Laborers Union Local 563 v. City of St. Paul, 270 Minn. 427, 134 N.W.2d 26 (1965)	33, 58
Cooperrider v. Civil Service Commission of San Francisco, 97 Cal. App.3d 495, 158 Cal. Rptr. 801 (Ct. App. 1979)	53
Costa v. Bluegrass Turf Service, Inc., 406 F.Supp. 1003 (D. Ky. 1975)	53
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Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868)	45
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Crescent Park Tenants Association v. Realty Equities Corp. of N.Y., 58 N.J. 98, 275 A.2d 443 (1971)	5
Dandridge v. Williams, 397 U.S. 471 (1970)	54
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)	34
Demiragh v. DeVas, 476 F.2d 403 (2d Cir. 1973)	49
Detroit Police Officers Association v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), *app. dismissed*, 405 U.S. 950 (1972)	55

Cases: Page

District No. 1, Pacific Coast District, M.E.B.A. v. Ward, 505 F.Supp. 98 (W.D. Wash. 1981) ... 24

Doe v. Bolton, 410 U.S. 179 (1973) 20, 23

Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 416 A.2d 334 (1980) 28

Dunn v. Blumstein, 405 U.S. 330 (1972) 14, 45, 48, 49, 50, 56, 61

Edwards v. California, 314 U.S. 160 (1941) .. 39, 45,47

Edwards v. Leaver, 102 F.Supp. 698 (D.R.I. 1952) 23

Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P.2d 801 (1973) 53

Equal Employment Opportunity Commission v. Wyoming, ____ U.S. ____, 103 S.Ct. 1054 (1983) 62

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 1

Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976) 60

Fecheimer v. City of Louisville, 84 Ky. 306, 2 S.W. 65 (1886) 34

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 62

Gordon v. Committee on Character and Fitness, 48 N.Y. 2d 266, 397 N.E. 2d 1309, 422 N.Y.S. 2d 641 (1979) 24

Gospodonovich v. Clements, 108 F.Supp. 234 (E.D.La.), *app. dismissed*, 344 U.S. 911 (1953) 23

Graffty v. City of Rushville, 107 Ind. 502, 8 N.E. 609 (1886) 33

Graham v. Richardson, 403 U.S. 365 (1971) 52

Hague v. CIO, 307 U.S. 496 (1939) 22

Cases: Page

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) . 51, 52

Harker v. McKissock, 12 N.J. 310, 96 A.2d 660 (1953) 5

Hassan v. Town of East Hampton, 500 F.Supp. 1034 (E.D. N.Y. 1980) 53, 54,62

Hicklin v. Orbeck, 437 U.S. 518 (1978) 13, 16, 21, 23, 24, 28, 30, 31, 36, 37, 39, 40, 41, 44, 53

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 42

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) . 27

In re Jarvis, 66 Kan. 329, 71 Pac. 576 (1903) 33

Jones v. Helms, 452 U.S. 412 (1981) 47

Justice v. Manzagol, 11 E.P.D. ¶10, 758 (D.N.M. 1976) 53, 59

Keenan v. Board of Law Examiners of North Carolina, 317 F.Supp. 1350 (E.D.N.C. 1970) 52

King v. New Rochelle Municipal Housing Authority of City of Newport, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971) 50

Laborers Local Union No. 374 v. Felton Construction Company, 98 Wash. 2d 121, 654 P.2d 67 (1982) 24, 28

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 52, 54

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Cases: Page

Massey v. Apollonio, 387 F.Supp. 373 (D. Maine 1974) 53

McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) 55, 56

McCready v. Virginia, 94 U.S. 391 (1877) 40

McGraw v. Town of Marion, 98 Ky. 673, 34 S.W. 18 (1896) 33

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 14, 15, 26, 45, 46, 47, 48, 49, 54, 56, 58, 59, 61

Minnesota v. Barber, 136 U.S. 313 (1890) 34

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Mullaney v. Anderson, 342 U.S. 415 (1952) 20, 23, 25, 28, 31

National League of Cities v. Usery, 426 U.S. 833 (1976) 43

National Motor Freight Assn. v. United States, 372 U.S. 246 (1963) 5, 62

Nehring v. Ariyoshi, 443 F.Supp. 228 (D. Hawaii 1977) 52, 54

Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 367, 437 A.2d 733 (Ch. Div. 1981), *aff'd.*, ____ N.J. Super. ____, ____ A.2d ____, (App. Div. 1982), *app. pending*, ____ N.J. ____ (No. 20, 700, 1983) 24, 28, 29, 37, 55

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TABLE OF AUTHORITIES CITED—*(Continued)*

Cases:	Page
Nyquist v. Mauclet, 432 U.S. 1 (1977)	52, 54
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Pease v. Hansen, 404 U.S. 70, *rev. mem.*, 157 Mont. 99, 483 P.2d 720 (1971)	49
People ex rel. Holland v. Bleigh Construction Co., 61 Ill. 2d 258, 335 N.E. 2d 469 (Ill. 1975)	28, 53
Pennoyer v. Neff, 95 U.S. 714 (1878)	62
Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D.N.H. 1982)	24
Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 79 Cal. Rptr. 77, 456 P.2d 645 (1969)	52
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	42
Rendell-Baker v. Kohn, ___ U.S. ___, 102 S. Ct. 2764 (1982)	38
Ringlieb v. Parsippany-Troy Hills Tp., 59 N.J. 348, 283 A.2d 97 (1971)	28
Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971), *aff'd mem.* 404 U.S. 1054 (1972)	49
Russo v. Reed, 93 F. Supp. 554 (D. Maine 1950)	24
Sailors v. Board of Education of the County of Kent, 387 U.S. 105 (1967)	29
Sargus v. West Virginia Board of Law Examiners, 294 S.E. 2d 440 (W.Va. 1982)	24
Salla v. County of Monroe, 48 N.Y. 2d 514, 399 N.E. 2d 909, 423 N.Y.S. 2d 878 (1979), *cert. denied sub nom., Abrams v. Salla*, 446 U.S. 909 (1980)	24, 28, 37

Cases: Page

Shapiro v. Thompson, 394 U.S. 618 (1969) . . . 14, 45, 46, 47, 48, 49, 50, 54, 56, 58, 59, 61

Sheard v. Department of Social Welfare, 310 F. Supp. 544 (N.D. Iowa 1969) 49

Sheley v. Alaska Bar Association, 620 P.2d 640 (Alaska 1980) 24

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 18

Smith v. Texas, 233 U.S. 630 (1914) 50

Sosna v. Iowa, 419 U.S. 393 (1975) 61, 63

Spradling v. Hutchinson, 253 S.E. 2d 371 (1979) 53

Stalland v. South Dakota Board of Bar Examiners, 530 F. Supp. 155 (D. S.D. 1982) 24

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State v. Mercer, 132 Md. 263, 103 A. 570 (1918) . 33

State v. Nolan, 108 Minn. 170, 122 N.W. 255 (1909) 33

State v. Wylie, 516 P.2d 142 (Alaska, 1973) . 53, 60, 61

Steed v. Dodgen, 85 F. Supp. 956 (W. D. Texas 1949) 24, 25

Stevens v. Campbell, 322 F. Supp. 102 (D. Mass. 1971) 53

Strauss v. Alabama State Bar, 520 F. Supp. 173 (N.D. Ala. 1981) 24

Strong v. Collatas, 593 F.2d 420 (1st Cir. 1979) . 50

Sugarman v. Dougall, 413 U.S. 634 (1973) 60

Tangier Sound Watermen's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982) 23

Cases: Page

Toomer v. Witsell, 334 U.S. 385 (1948) 11, 12, 15, 16, 20, 23, 25, 28, 30, 35, 36, 38, 39

Truax v. Raich, 239 U.S. 33 (1915) 51, 52, 54

Twining v. New Jersey, 211 U.S. 78 (1908) 47

United States v. Caroline Products Co., 304 U.S. 144 (1938) 52

United States v. Guest, 383 U.S. 745 (1966) 47

Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971) 50

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Ward Baking Co. v. City of Fernandina, 29 F.2d 789 (S.D. Fla. 1928) 32

Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) . 11, 20, 21, 23, 25, 28, 32, 47

Wardwell v. Board of Education of City School District, 529 F.2d 625 (6th Cir. 1976) 55, 56

Warth v. Seldin, 422 U.S. 490 (1975) 5

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 54

White v. Massachusetts Council of Construction Employers, Inc., ___ U.S. ___, 103 S. Ct. 1042 (1983) 10, 13, 24, 38, 42

Williams v. Fears, 179 U.S. 270 (1900) 47

Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975) 55, 56

Zobel v. Williams, ___ U.S. ___, 102 S.Ct. 2309 (1982) 31, 48, 63, 64

Page

UNITED STATES CONSTITUTIONAL PROVISIONS:

Article IV, §2 ..... *Passim*

14th Amendment, §1 ..... *Passim*

ARTICLES OF CONFEDERATION:

Article IV, §1 (1781) 17, 23, 46

STATUTES AND RULES:

28 U.S.C. §1257(2) 1
N.J.S.A. 10:5-31 to 38 5
N.J.S.A. 10:5-32 ..... 4, 6, 9
N.J.S.A. 10:5-34 5
N.J.S.A. 10:5-36(c) 4, 6, 9
N.J.S.A. 18A:26-1.1 56
N.J.S.A. 34:9-2 55
N.J.S.A. 40A:11-13 39
N.J.S.A. 40A:14-9.1 56
N.J.S.A. 40A:14-122.1 56
N.J.A.C. 17:27-6.5 ..... 4, 6, 9
N.J.A.C. 17:27-6.5(a) 6
N.J.A.C. 17:27-6.5(b) 6
N.J.A.C. 17:27-7.3 6
N.J. Court Rule 2:12-1 9

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TABLE OF AUTHORITIES CITED—*(Continued)*

BOOKS, TREATISES AND MISCELLANEOUS AUTHORITIES: Page

III. *Documentary History of the Constitution of the United States, 1786-1870*, 56th Cong., 2d Sess., Doc. No. 529 (1900) ... 18

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Ely, *Toward a Representation—Reinforcing Mode of Judicial Review*, 37 MD.L. REV. 451 (1978) 19

Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982) 43

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A. Nevins, The American States During and After the Revolution, 1775-1789 (1924) . 18

Note, *Construction Worker Residency Requirements: A Constitutional Response*, 17 NEW ENG. L. REV. 461 (1982) 41

Note, *Durational Residency Requirements from Shapiro Through Sosna: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 662 (1975) 50

BOOKS, TREATISES AND MISCELLANEOUS AUTHORITIES: Page

Note, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129 (1975) 46

The Philadelphia Inquirer (May 7, 1983, May 15, 1983) 40

Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 UNIV. OF PA. L. REV. 379 (1979) 16, 19

L. Tribe, American Constitutional Law (1978) 22, 36, 43

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OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982, is reported at 88 N.J. 317, 443 A.2d 148 (1982) and appears in the Appendix to appellant's Jurisdictional Statement at A1-A32.[1]

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Notice of Appeal and a Jurisdictional Statement were filed within ninety (90) days of that date. Probable jurisdiction was noted on March 7, 1983, ___ U.S. ___, 103 S. Ct. 1270 (1983). This Court's jurisdiction is invoked under 28 U.S.C. §1257(2). *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

United States Constitution, Article IV, §2, Cl. 1:

"The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Fourteenth Amendment, §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The ordinance of the City of Camden whose constitutionality is at issue herein is set forth in its entirety at A36-A58. In relevant part, it provides as follows:

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1. "A" followed by a page number refers to the Appendix to appellant's Jurisdictional Statement and constitutes the Joint Appendix for this matter.

> Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.[2]

C. IV. *Developer/Contractor's Contr. ·ng Obligations.*

> a. The developer/contractor to whom this ordinance is applicable, shall submit to all contractors and sub-contractors copies of this ordinance and shall make compliance with it, a specification of all bids. The developer/contractor shall require that by submitting a bid, a contractor or sub-contractor certifies that he/she will comply with the requirements of this ordinance.[3]
>
> b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden.[4]

VII. *Union Statements.*

When a contractor has a referral agreement or arrangement with a union covering workers to be employed on a project to which this ordinance applies, such

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2. A54-A55.
3. A40.
4. A56.

contractor shall submit with his/her bid a statement signed by an authorized union official, in which the union agrees as follows:

1. Said union is aware of the terms, conditions and goals of the within ordinance.

2. Said union is aware of the position of the City of Camden as the third party beneficiary with regards to the right to recover monetary damages on behalf of those adversely affected by non-compliance with the within ordinance.

3. Said union shall make a good faith attempt to assist the contractor and/or sub-contractor, as the case may be, to comply with the terms, conditions and goals set forth within this ordinance . . .[5]

VIII. *Sub-contractors.*

The developer shall require that each prime contractor is responsible for the performance of his sub-contractors in the implementation of the aforementioned equal employment requirements during the performance of the contract. Whenever the contractor sub-contracts a portion of the work on the project, the sub-contract shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he were the contractor . . .[6]

I. *Definitions.*

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the period of employment or contract. For the purpose of this ordinance a resident must be a domicile of the City of Camden expressing an intention to make this City his permanent place of residence.[7]

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5. A45.
6. A46.
7. A38.

This municipal ordinance was approved by the Chief Affirmative Action Officer of the Department of the Treasury, State of New Jersey, acting pursuant to N.J.S.A. 10:5-32 and 36(c) and N.J.A.C. 17:27-6.5.[8]

STATEMENT OF THE CASE

The appellant, the United Building and Construction Trades Council of Camden County and Vicinity (hereinafter referred to as "the Council") seeks review of a judgment of the Supreme Court of New Jersey (A1-A32), which upheld the constitutionality of a resident preference ordinance, enacted by the City of Camden, New Jersey and approved by the State, which requires that at least forty per cent of the private employees hired by private contractors and sub-contractors engaged in public works construction projects for the city be municipal residents for one year prior to employment.[9]

The Council is a non-profit association of labor organizations which represent private employees in the building and construction trades in Camden, Burlington, Gloucester, Salem and Cumberland Counties in New Jersey. Over one-third of the unions represented by the Council have offices outside of New Jersey in Pennsylvania and Delaware. Due to its location on the Delaware River, immediately across from Philadelphia, Pennsylvania, Camden, New Jersey is readily accessible to residents of both Pennsylvania and Delaware. Employees who are members of the unions which comprise the Council include persons who reside in the City of Camden, persons who reside in New Jersey but outside

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8. A62.

9. In the same opinion, the New Jersey Supreme Court also upheld a challenge to the Camden City ordinance which established a twenty-five per cent minority hiring goal for employees engaged in public works construction projects. The appellant is not appealing that portion of the lower court's decision.

the City of Camden and persons who reside outside the State of New Jersey.[10] These individuals are employed by various private construction contractors and sub-contractors, work in all counties where the Council has territorial jurisdiction and have performed and will continue to seek to perform work on construction projects in the City of Camden. Many are "steady hands" who regularly work for such construction industry employers and move with them from project to project, and many perform extremely specialized tasks.

The Camden resident preference ordinance was enacted pursuant to the 1975 amendments to the New Jersey Law Against Discrimination, which sought to establish a comprehensive affirmative action program in the awarding of public works contracts. *L.* 1975, C. 127, N.J.S.A. 10:5-31 to 38. Under this state statute, a prospective public works contractor is required to formulate and submit for approval to the New Jersey Department of the Treasury "his or its affirmative action program whereby he or it guarantees minorities employment in all employment categories***." N.J.S.A. 10:5-34. No public works contract can be awarded by the state, county, municipality or other political subdivision nor any monies paid thereunder to any prospective contractor "who has not agreed and guaranteed to afford equal

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10. It should be noted that the Council, an unincorporated association, is not a legal entity apart from its members, *see Harker v. McKissock*, 12 N.J. 310, 96 A.2d 660 (1953). Moreover, this Court long has recognized that an association may initiate litigation as the representative of its members, as long as it alleges that one or more of its members is suffering immediate or threatened injury as a result of the challenged action. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 511 (1975); *National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963). *See also Crescent Park Tenants Association v. Realty Equities Corp. of New York*, 58 N.J. 98, 275 A.2d 433 (1971), in which the New Jersey Supreme Court also recognized an association's power to initiate litigation to vindicate the rights of its members.

opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." N.J.S.A. 10:5-32.

As an alternative to state approval of all affirmative action plans submitted by prospective public works contractors, the statute authorizes state and local agencies to devise their own particular affirmative action programs and submit them for approval to the State Treasurer. N.J.S.A. 10:5-36(c). The New Jersey Department of the Treasury established by regulation a procedure by which any municipality or public agency may have its affirmative action construction programs so approved. N.J.A.C. 17:27-6.5. State approval of such programs supersedes the otherwise applicable statutory requirements with respect to the submission of affirmative action plans by prospective contractors on all public works contracts.[11] Thus, prospective contractors for public works contracts from a public agency with a state-approved affirmative action construction program need not have their own individual affirmative action programs approved by the State Treasurer on a contract-by-contract basis and need only comply with the requirements of the public agency's state-approved program.[12]

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11. Thus, N.J.A.C. 17:27-6.5(a) provides that an approved public agency program "shall exclusively establish the state affirmative action procedures and requirements which implement P.L. 1975, C. 127 *** as applied to construction contracts and subcontractors involving said public agency."

12. In determining whether to approve a public agency's affirmative action program, the State Treasury Department is guided by N.J.A.C. 17:27-6.5(b), which sets forth the minimum requirements for state approval. (A62). These criteria are a requirement that the public agency's construction contracts include certain mandatory contract language, a requirement that the public agency's bid advertisements state that bidders must comply with the affirmative action statute and a requirement that the public agency's minority employment percentage goal not be less than that set by the Treasury Department in N.J.A.C. 17:27-7.3 for the county in which the construction project is located. There is nothing in the

On July 24, 1980, the City of Camden, New Jersey adopted "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf of the City of Camden."[13] An amendatory ordinance was enacted on August 28, 1980.[14] The stated purpose of these ordinances was to relieve unemployment among City residents,[15] and the ordinances were designed to permit Camden to substitute its affirmative action program for the state mandate normally imposed on individual public works contractors.

The Camden ordinances provide in pertinent part, that "any party performing or offering to perform a contract for public construction in the City of Camden" (Article I, §1, Definitions of "Developer/Contractor"[16] "in hiring for jobs, shall make every effort to employ persons residing in the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden" (Amended Article IV, §b).[17] The ordinance applies "[W]herever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00 . . . [and] also appl[ies] to the development and construction of all residential housing of four (4) units or more."[18] The term "resident of the City of Camden" is defined as follows:

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state statute or regulations promulgated by the State Treasurer which provides for employment preference by private contractors based upon residency.

13. A36-A53.
14. A54-A58.
15. A36-A37.
16. A37.
17. A56.
18. A54-A55.

> "***any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence. [Article I, §5].[19]

Taken together, these provisions absolutely exclude out-of-state workers from forty per cent of all jobs in a major segment of the construction industry in Camden and mandate that private contractors, as a condition of doing business with the City of Camden, make their employment decisions solely on the basis of an applicant's state and duration of residency, regardless of the individual's qualifications and unemployment status. The ordinance compels private developers, contractors, and subcontractors to have no less than forty per cent of their workforce on any particular municipal construction project consist of people who have lived in Camden for at least one year and have expressed an intention to make the City their permanent place of residence. Thus, an out-of-state resident is excluded from access to a significant segment of private sector employment opportunities, regardless of whether he or she is unemployed, a minority, or possesses more skills for the requisite job. Similarly, a long term Camden resident is preferred over a new arrival, solely on the basis of length of residence within the municipality.

In addition to private contractors, the ordinance applies to the hiring decisions of sub-contractors[20] and to referrals from union hiring halls,[21] neither of which

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19. A38.
20. A40, A46.
21. A45.

have any connection with the City of Camden. The affected individuals are *all private employees*, whose only connection with the municipality is the location of the job site. The stated terms of the ordinance apply to public works projects constructed by private parties, to any financial benefit conferred by the City excluding a property tax abatement, the fair market value of which exceeds $50,000.00, and also to the development and construction of all residential housing of four (4) units or more.[22]

Subsequent to its passage, the City submitted its ordinance to the Chief Affirmative Action Officer of the New Jersey Treasury Department for approval.[23] On November 24, 1980 the Chief Affirmative Action Officer, acting pursuant to N.J.S.A. 10:5-32 and 36(c) and N.J.A.C. 17:27-6.5, approved the Camden ordinances and designated the Affirmative Action Program of the City of Camden as a state-approved affirmative action construction program.[24] This program could not be implemented absent such authorization. As a result of this approval, all prospective private contractors, sub-contractors, and union hiring halls are required to comply with Camden's resident preference requirements.

The Council filed a timely notice of appeal with the New Jersey Superior Court, Appellate Division, challenging the validity of the action taken by the Chief Affirmative Action Officer and the constitutionality of the Camden ordinance. On June 19, 1981, the New Jersey Supreme Court accepted this appeal by direct certification pursuant to New Jersey Court Rule 2:12-1 and sub-

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22. A54-A55.

23. A59.

24. A60. Other than the exchange of correspondence and the submission of the ordinance, there were no other administrative proceedings prior to the approval of the ordinance. Appellant did not participate in any fashion in this administrative process, nor was it or any other party afforded an opportunity to do so.

sequently upheld the constitutionality of Camden's exclusion of out-of-state residents from access to a significant portion of private employment opportunities on construction projects within the City.

Although the Court recognized that the Camden ordinance involved the imposition of resident hiring quotas upon private employers, whereas previous decisions in the area have involved residency requirements for municipal employees, the Court did not believe that this distinction deprived the ordinance of its constitutional validity, either under the Privileges and Immunities Clause, Commerce Clause or Equal Protection Clause of the United States Constitution.[25]

SUMMARY OF ARGUMENT

The Camden resident hiring quota, by excluding all out-of-state residents from access to forty per cent of the jobs with private employers on public works construction projects and by limiting these job opportunities to municipal residents of a year or more, undermines the principles of equality of opportunity and national unification which are the very foundation upon which this Union was built. The invidious discrimination based on length and state of residency effected by the Camden ordinance is repugnant both to the Privileges and Immunities Clause of Article VI, §2, which was adopted to protect the rights of out-of-state residents, and the Equal Protection Clause, which protects the rights of all residents within a state.

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25. In view of this Court's recent decision in *White v. Massachusetts Council of Construction Employers, Inc.*, ____ U.S. ____, 103 S. Ct. 1042 (1983), which held that an executive order of the Mayor of Boston, which requires all construction projects funded in whole or in part by city funds to be performed by at least fifty per cent bona fide city residents, is immune from commerce clause scrutiny because Boston was acting as a market participant, appellant herein no longer presses its commerce clause challenge to the Camden ordinance.

The Privileges and Immunities Clause, esteemed to be the "basis of the Union,"[26] seeks "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned," *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), by insuring "to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Although the contours of the Clause are not fully developed, this Court has long recognized that the clause solicitously "secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation." *Ward v. Maryland*, 70 U.S. (12 Wall.) 418, 430 (1871). Striking at this core objective of the Privileges and Immunities Clause to protect out-of-state residents' right to pursue their lawful trades, the Camden ordinance excludes all out-of-state residents from competing for forty per cent of the private jobs offered in a major segment of the construction industry. Moreover, because the excluded individuals are all private employees whose only connection with the municipality is the location of the job site, Camden's hiring quota represents an attempt by a governmental entity to interfere with private contractual relations to further a protectionist purpose, by exercising its financial leverage and immense power to exclude nonresidents from access to significant *private* employment opportunities.

Despite the fact that the Camden ordinance denies all out-of-state residents the right to compete for private employment jobs on public works construction projects, the New Jersey Supreme Court ruled that it did not violate the Privileges and Immunities Clause.[27] Without re-

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26. THE FEDERALIST NO. 80 at 478 (A. Hamilton) (C. Rossiter ed. 1961)

27. A.26.

lying on either a factual record or precedent, the Court reasoned that because the municipal ordinance "almost certainly affects more New Jersey residents not living in Camden that it does out-of-state residents . . . it does not violate any privilege of state citizenship" and is therefore immune from constitutional review under the Privileges and Immunities Clause.[28] By so holding, the New Jersey Supreme Court has redefined the Privileges and Immunities Clause to apply solely to the actions of a state itself and immunized discriminatory treatment of all out-of-state residents, as long as the discrimination is effected by a municipal ordinance.

The Court recognized that a state is constitutionally powerless to compel private parties to prefer nonresidents on public works construction,[29] yet its holding permits a state to induce indirectly through municipal enactments the very discriminatory conduct which a state is precluded from engaging in directly. Moreover, its decision permits the cities of New Jersey and every other state to independently attempt to accomplish what the state cannot — excluding out-of-state residents from access to a significant portion of employment opportunities. The concerns and purposes of the Privileges and Immunities Clause are no less implicated when the exclusion is accomplished by local ordinance, rather than by state action. The "one Nation" which the Privileges and Immunities Clause was designed to create out of "a collection of independent, sovereign States," *Toomer v. Witsell, supra*, 334 U.S. at 395, could be just as easily destroyed by independent cities acting to further their own parochial interests as by independent, sovereign states. Permitting Camden to penal-

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28. There was absolutely no evidence in the record nor did the New Jersey Supreme Court point to any to justify its determination that the Camden residency requirement affects more New Jersey residents not living in Camden than it does out-of-state residents.

29. A26, n.8.

ize out-of-state residents merely invites retaliation, which was one of the very evils which the adoption of the Constitution, and the Privileges and Immunities Clause in particular, was designed to eliminate. *Austin v. State of New Hampshire*, 420 U.S. 656, 667 (1975).

Once it is established that the Camden resident hiring quota is subject to Privileges and Immunities scrutiny, then the City must show that its ordinance passes the two-pronged Privileges and Immunities test adopted by this Court. Under established principles, the ordinance does not survive constitutional muster, because Camden has not demonstrated either that nonresidents constitute a "peculiar source of the evil" at which the ordinance is aimed, *Hicklin v. Orbeck*, 437 U.S. 518, 525-526 (1978), or that the discrimination practiced bears a substantial relationship to the particular evil that the nonresidents are said to present. *Id.* 526.

Finally, unlike the Commerce Clause, the Privileges Immunities Clause imposes a direct limitation on governmental enactments. As a charter of personal rights, the Clause constitutes an express denial of the right of any state to make residency alone the basis of any act of discrimination. Thus, the distinction between market participation and market regulation applied when considering municipal enactments under the Commerce Clause,[30] is inapplicable to Privileges and Immunities Clause analysis. Rather, the Clause by its very terms applies to *all* governmental action, regardless of the characterization of the government's role in the market place.

Even if the Camden resident hiring quota does not violate the Privilege and Immunities Clause, by restricting the very means of economic subsistence, *i.e.*, access to employment opportunities, to long term Camden residents, the City's ordinance impinges on the fundamen-

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30. *White v. Massachusetts Council of Construction Employers, Inc.* ____ U.S. ____, 103 S.Ct. 1042 (1983).

tal constitutional right of interstate travel and thereby violates the Equal Protection Clause.

Over the past fifteen years this Court has consistently invalidated durational residency requirements which have been found to impermissibly penalize the fundamental right to interstate travel. *See, e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In striking down such classifications, this Court has stressed that "they impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right," *Dunn v. Blumstein, supra*, 405 U.S. at 342. These durational residency requirements create two classes of needy residents, distinguishable only on the basis of length of residency. Thus, in the instant case, Camden is discriminating between new and long term residents, similarly situated in every respect, except that the former individuals are denied access to employment opportunities merely because they have recently exercised their right to travel.

Moreover, the new residents' right to travel is penalized when they are deprived of vital benefits such as welfare, *Shapiro v. Thompson, supra*, and medical care, *Memorial Hospital v. Maricopa County, supra*. Access to employment opportunities is similarly essential; this Court repeatedly has recognized that access to the common occupations of life is of the very essence of personal freedom and opportunity which the Fourteenth Amendment was adopted to secure. Indeed, this Court could not logically find that it is unconstitutional to impose a durational residency requirement on an individual seeking welfare, but it is permissible to impose the very same requirement on someone seeking access to employment in order to escape welfare.

Because such durational residency requirements penalize the fundamental right to interstate travel, they must be necessary to achieve a compelling governmen-

tal interest, *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 258. Although the City's interest in reducing unemployment may be laudable, it is not compelling, because the City seeks to regulate purely private employment through its ordinance. In addition, unless the means Camden has adopted to reduce unemployment are precisely tailored to accomplish the City's stated objectives, these means are not considered necessary. Camden's means are not precisely or even remotely tailored to achieve its goal of reducing unemployment, as the ordinance is targeted to benefit long term residents, rather than the long term unemployed. By making some citizens more equal than others in the area of access to employment opportunities, Camden has employed means repugnant to the fundamental constitutional rights guaranteed by the Equal Protection Clause.

ARGUMENT

I. BY EXCLUDING OUT-OF-STATE RESIDENTS FROM ACCESS TO FORTY PER CENT OF THE JOBS WITH PRIVATE EMPLOYERS ON PUBLIC WORKS CONSTRUCTION PROJECTS, THE CAMDEN RESIDENT HIRING QUOTA VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. The Constitutional Ban on Discrimination Against Out-of-State Residents Embodied in the Privileges and Immunities Clause Was Adopted as an Instrument of National Unification.

The Privileges and Immunities Clause of Article IV, §2 provides that "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Intended "to help fuse into one Nation a collection of independent sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) the Clause "establishes a norm of comity," *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975), "that is to prevail among the States with respect to their treatment of each other's

residents." *Hicklin v. Orbeck*, 437 U.S. 518, 523-24 (1978). The purpose of the Clause, as described in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) is

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.

The Clause was designed both expressly to limit a state's power to discriminate against nonresidents as well as to foster national unity:

> The primary purpose of this clause, like the clauses between which it is located — those relating to full faith and credit and to interstate extradition of fugitives from justice was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.

Toomer v. Witsell, *supra*, 334 U.S. at 395-96.

Although not extensive, the available evidence of the Framers' intent in drafting the Privileges and Immunities Clause indicates that the Clause was designed as an instrument of national unification.[31] The Clause is

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31. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 UNIV. OF PA L. REV. 379, 383 (1979). The concern to limit a state's power to discriminate against inhabitants of other states antedated the Constitution. As one commentator elaborated: "In 1776, even before the American colonies became states, a committee of the Continental

derived from the fourth article of the Articles of Confederation, which provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

19 JOURNALS OF THE CONTINENTAL CONGRESS 214-15 (G. Hunt ed. 1912).

Finding that the discrimination by states against "outlanders," at which this Clause was aimed, was not eradicated during the period of the Confederation, the Framers carried over the provision "into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation." *Austin v. State of New Hampshire*, *supra*, 420

Congress, appointed to propose articles of confederation, drafted two articles protecting the inhabitants of one colony from discrimination by another. *See* Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 2-5 (1967). English law protective of 'alien friends' is traced to the Magna Carta in R. HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP 9-13 (1918). Howell futher claimed that, by the time of the Articles of Confederation, 'independently of any constitutional provision, the citizens of the thirteen original states were entitled to the enjoyment of a considerable class of privileges upon removal from their own to another State.' *Id.* 13. In his view, the constitutional provisions were drafted to extend the scope of these protections and render them more secure. *Id.*" Varat, *State Citizenship and Interstate Equality*, 48 UNIV. OF CHI. L. REV. 487 n.1 (1981).

U.S. at 660-61 (citations omitted).[32] Charles Pickney of South Carolina, the recognized author of the Privileges and Immunities Clause, *Id.* 661 n.6, assured the Constitutional Convention that the Clause is "framed exactly upon the principles of the 4th article of the present confederation . . ." 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 112 (1911).[33] Moreover, because the delegates to the Constitutional Convention adopted virtually without debate the Privileges and Immunities Clause submitted to them by the Committee of Detail,[34] it is reasonable to infer that

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32. The internecine warfare between the states which led to the Federal Constitutional Convention of 1787 is familiar to every reader of history and needs no detailed description here. *See* G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION (1882); J. FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY (1888); A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789 (1924); C. WARREN, THE MAKING OF THE CONSTITUTION (1937). James Madison in a commentary on the plan of union proposed by William Paterson of New Jersey wrote: "Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens [of other states] are entitled to equality of privileges by the Articles of Confederation." 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 317 (1911), cited in *Austin v. New Hampshire*, *supra*, 420 U.S. at 660, n.5.

33. Similar sentiments were reflected in the *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 75 (1873), in which the Court compared the Privileges and Immunities Clause enunciated in the Articles of Confederation with that of the Constitution:

> There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

34. III. DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 1786-1870, 56th Cong., 2d Sess., Doc. No. 529 at 456, 634, 731 (1900).

the specific provisions of the Articles of Confederation upon which the Clause undoubtedly is based were widely understood to form the basis of the Clause.[35]

Despite its meager constitutional history, the Privileges and Immunities Clause has been considered of vital importance to national unification. Thus, Alexander Hamilton stressed that the Clause "may be esteemed the basis of the Union." THE FEDERALIST No. 80 at 478 (A. Hamilton) (C. Rossiter ed. 1961). Almost eighty years after the adoption of the Clause, this Court emphasized:

> 'It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.'
>
> Indeed, without some provision of this kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists. (citations omitted).

Paul v. Virginia, *supra*, 75 U.S. (8 Wall) at 180.

It is against these fundamental constitutional concerns of comity, unity and federalism that the Camden resident hiring quota must be tested.[36]

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35. *See* Simson, *Discrimination Against Nonresidents and The Privileges and Immunities Clause of Article IV*, 128 UNIV. OF PA. L. REV. *supra*, at 384.

36. Both this Court, as well as commentators, have suggested that the heightened scrutiny of the Privileges and Immunities Clause is necessary to protect nonresidents who are completely unrepresented in the decisionmaking body's legislative process and are political outsiders in the fullest sense. *See Austin v. New Hampshire*, *supra*, 420 U.S. at 662-663; J. ELY, DEMOCRACY AND DISTRUST (1981); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Simson, *Discrimination Against Nonresidents and the Privileges and Immuni-*

B. A Core Concern of the Privileges and Immunities Clause Is the Exclusion of Out-of-State Residents Seeking Access to Private Employment Opportunities within the City of Camden.

In protecting both individual rights to non-discriminatory treatment and promoting the structural balance essential to the concept of federalism, the Privileges and Immunities Clause makes nonresidence an improper basis for imposing a special burden. *Austin v. New Hampshire*, *supra*, 420 U.S. at 662. Thus, this Court consistently has struck down state statutes which place unreasonable burdens on out-of-state citizens and whose sole basis for classification is place of residency as violative of the Privileges and Immunities Clause. *See, e.g., Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1871) (Maryland statute regulating sale of goods in City of Baltimore violated the Privileges and Immunities Clause by requiring nonresident merchants to obtain licenses to practice their trade without requiring the same of similarly situated Maryland merchants, charging nonresidents higher license fees than Maryland merchants and prohibiting merchants from using nonresident salesman, other than their regular employees, to sell their goods in the City); *Toomer v. Witsell*, *supra*, (invalidating a South Carolina statute that required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (striking down a plan employed by the Territory of Alaska for the licensing of commercial fisherman which charged nonresidents forty-five dollars more for licenses than residents); *Doe v. Bolton*, 410 U.S. 179 (1973) (holding that a state criminal abortion statute which pro-

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NOTE — *(Continued)*

ties Clause of Article IV, 128 UNIV. OF PA. L. REV. *supra*, at 384-385.

hibits all abortions except those performed on bona fide state residents violates the Privileges and Immunities Clause by denying medical services to out-of-state residents); *Austin v. New Hampshire*, *supra*, (State commuter income tax falling exclusively on incomes of nonresidents and not offset by other taxes imposed on residents alone held violative of Privileges and Immunities Clause); *Hicklin v. Orbeck*, *supra*, (Alaskan statute which required that all contracts in connection with the construction of Alaskan oil and gas pipelines contain a provision requiring the employment of qualified Alaskan residents in preference to nonresidents held violative of the Privileges and Immunities Clause in that it unreasonably discriminated against citizens of other states).

Consistent with the clear purposes and underlying objectives of the Privileges and Immunities Clause, this Court has long recognized that the Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation." *Ward v. Maryland*, *supra*, 70 U.S. (12 Wall) at 430. Although the contours of the Privileges and Immunities Clause are not well developed, *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 380 (1978), and there has been some question whether the Clause requires equality of treatment with respect to all rights and privileges conferred by a state on its own citizens, or only those rights and privileges that might be termed "fundamental," *Id.* 381,[37] there has never been any question that "one of

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37. In the first major case interpreting the Privileges and Immunities Clause, Justice Bushrod Washington concluded that the Clause encompassed those privileges "which are in their very nature, fundamental," commenting:

> The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the

the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of

NOTE—(Continued)

> citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Corfield v. Coryell, 6 Fed. Cas. 546, 551-52 (C.C.E.D. Pa. 1825). It has been suggested that Justice Washington's opinion reflected the jurisprudence of the day and was an attempt to impart the natural rights doctrine into the Constitution by way of the Privileges and Immunities Clause, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 405-06 (1978). In *Paul v. Virginia*, *supra*, the Court limited the reach of the Clause and stressed that the measure of the right secured to nonresidents was the extent of the rights afforded by a state to its own citizens: "It was undoubtedly the object of the clause . . . to place citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Id.* 180. *See also Hague v. CIO*, 307 U.S. 496, 511 (1939) ("[it] has come to be the settled view that Article IV, §2 does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy.").

substantial equality with the citizens of that State." *Toomer v. Witsell, supra,* 334 U.S. at 396. This Court consistently has recognized that the right to engage in "common callings" *Id.* 403, and to pursue "ordinary livelihoods" *Id.* 408 (Frankfurter, J., concurring), is worthy of the safeguards of the Privileges and Immunities Clause.[38]

Indeed, many of this Court's most significant decisions invalidating state laws as violative of the Privileges and Immunities Clause arose in the context of state efforts to limit nonresidents' commercial and employment opportunities. *See, e.g., Ward v. Maryland, supra,* (sale of goods); *Toomer v. Witsell, supra,* (commercial fishing); *Mullaney v. Anderson, supra, (commercial fishing); Hicklin v. Orbeck, supra,* (employment on oil and gas pipelines). Similarly, state and federal courts have regularly struck down laws which interfere with an individual's right to engage in a chosen occupation solely because of residency.[39]

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38. Initially recognized in the Articles of Confederation ("the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce . . ."), the right of access by nonresidents to employment opportunities as a core concern of Privileges and Immunities Clause has been repeatedly stressed. *See, e.g., Corfield v. Coryell, supra,* 6 Fed. Cas. at 552 ("the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . ."); *Doe v. Bolton, supra,* 410 U.S. at 200 ("Just as the Privileges and Immunities Clause, Const. Art IV, §2, protects persons who enter other states to ply their trade . . . so must it protect persons who enter Georgia seeking medical services that are available there . . .") (citations omitted); *Hicklin v. Orbeck, supra,* 437 U.S. at 525 ("Ward [79 U.S. (12 Wall.) 418] thus recognized that a resident of one state is constitutionally entitled to travel to another state for purpose of employment free from discriminatory restrictions in favor of state residents imposed by the other states.")

39. Thus, courts have struck down laws which interfere with an out-of-state resident's right to engage in commercial fishing, *see, e.g., Tangier Sound Watermen's Assoc. v. Douglas,* 541 F. Supp. 1287 (E.D. Va. 1982); *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska, 1962); *Gospodonovich v. Clements,* 108 F. Supp. 234 (E.D. La.), *app. dismissed,* 344 U.S. 911 (1953); *Edwards v. Leaver,* 102

Even when this Court has held that allegedly discriminatory state laws are not repugnant to the Privileges and Immunities Clause, it almost invariably has

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NOTE — (*Continued*)

F. Supp. 698 (D.R.I. 1952); *Russo v. Reed*, 93 F. Supp. 554 (D. Maine 1950); *Steed v. Dodgen*, 85 F. Supp. 956 (W.D. Texas 1949); ferry boat operation, *District No. 1 Pacific Coast District, M.E.B.A. v. Ward*, 505 F. Supp. 98 (W.D. Wash. 1981) and public works construction, *Salla v. County of Monroe*, 48 N.Y. 2d 514, 399 N.E. 2d 909, 423 N.Y.S. 2d 878 (1979), *cert. denied sub nom., Abrams v. Salla*, 446 U.S. 909 (1980); *Neshaminy Constructors, Inc. v. Krause*, 181 N.J. Super 367, 437 A.2d 733 (Ch. Div. 1981), *aff'd.*, ___ N.J. Super ___ (App. Div. 1982), *app. pending*, ___ N.J. ___ (No. 20,700, 1983); *Mass. Council of Construction Employers, Inc. v. Mayor of Boston* ___ Mass. ___, 425 N.E. 2d 346 (1981) (striking down state statute, not appealed in *White v. Mass. Council of Construction Employers*, ___ U.S. ___ 103 S. Ct. 1042 (1983)); *Laborers Local Union No. 374 v. Felton Construction Company*, 98 Wash. 2d 121, 654 P.2d 67 (1982). Indeed, since this Court's holding in *Hicklin v. Orbeck*, the Privileges and Immunities Clause has been employed successfully to strike down residency requirements that discriminate against out-of-state applicants for admission to the bar. *See, e.g., Piper v. Supreme Court of New Hampshire*, 539 F. Supp. 1064 (D.N.H. 1982) (state residency requirement for practice of law violates Privileges and Immunities Clause); *Stalland v. South Dakota Board of Bar Examiners*, 530 F. Supp. 155 (D.S.D. 1982) (requirement that applicant for admission to practice law in South Dakota must be state resident violates Privileges and Immunities Clause); *Strauss v. Alabama State Bar*, 520 F. Supp. 173 (N.D. Ala. 1981) (Alabama rule requiring applicant to be bona fide resident at the time of certification to sit for the bar examination contravenes Privileges and Immunities Clause); *Noll v. Alaska Bar Association*, 649 P.2d 241 (Alaska 1982) (Alaska Bar Rule which requires that applicant for admission to State Bar be domiciled in Alaska violates Privileges and Immunities Clause); *Sargus v. West Virginia Board of Law Examiners*, 294 S. E.2d 440 (W. Va. 1982) (requiring applicant for admission to State Bar to be resident more than 30 days prior to taking Bar examination is discriminatory against nonresidents in violation of the Privileges and Immunities Clause); *Sheley v. Alaska Bar Association*, 620 P.2d 640 (Alaska 1980) (invalidates rule which requires applicant to establish domicile in Alaska at least 30 days before the bar examination); *Gordon v. Committee on Character and Fitness*, 48 N.Y. 2d 266, 397 N.E. 2d 1309, 422 N.Y.S. 2d

stressed that the challenged laws do not burden nonresidents in their efforts to earn a living.[40]

The City of Camden, by absolutely excluding all out-of-state residents from even competing for forty per cent of the private jobs offered in a major segment of the construction industry, has enacted an ordinance which not only discriminates against out-of-state residents on its face, but also imposes upon them a burden which strikes at the very core of the protection of the Privileges and Immunities Clause. The City is seeking to condition employment with private contractors solely on length and location of residency in Camden, and by thus restricting employment opportunities, it is regulating wholly private relationships in favor of parochial interests. Surely, access to private employment is the kind of "privilege" and "immunity" which "bear[s] upon the vitality of the Nation as a single entity. . . ." and the distinction imposed by the City, which hinders "the formation, the purpose, or the development of a single Union. . . ," *Baldwin v. Fish and Game Commission of Montana, supra*, 436 U.S. at 383, warrants careful scrutiny under the Privileges and Immunities Clause.

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641 (1979) (strikes down New York rule as violative of the Privileges and Immunities Clause which requires proof of state residency for at least six months prior to submission of application for admission to the bar). Unlike *Mullaney v. Anderson, supra*, which imposed a forty-five dollar ($45) higher licensing fee on nonresidents, or *Ward v. Maryland, supra*, *Toomer v. Witsell, supra*, or *Steed v. Dodgen, supra*, which imposed substantially increased fees on nonresidents, the Camden resident preference ordinance absolutely excludes out-of-state residents from access to forty per cent of the private jobs on public works construction.

40. *See, e.g., Baldwin v. Montana Fish and Game Commission, supra*, 436 U.S. at 388 (1978) (upholding higher license fees for nonresident elk hunters):

> Elk hunting by nonresidents in Montana is a recreation and a sport. . . . It is not a means to a nonresident's livelihood. . . . Appellant's do not — and cannot — contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel.

C. A Local Ordinance Which Discriminates Against Out-Of-State Residents by Denying Them Access to a Significant Portion of the Jobs Offered by Private Employers Engaged in Public Works Construction Projects Is Not Immune From Review under the Privileges and Immunities Clause Merely Because It Is Enacted by a Municipality Rather Than the State.

Although the Camden ordinance unequivocally denies out-of-state residents access to forty per cent of the private employment jobs on public works construction projects, the New Jersey Supreme Court ruled that it nonetheless did not violate the Privileges and Immunities Clause. Without relying on either a factual record or precedent, the Court reasoned that because the municipal ordinance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents . . . it does not violate any privilege of state citizenship" and is therefore immune from constitutional review under the Privileges and Immunities Clause.[41] The lower court's holding grants a municipality, a political subdivision of a state, greater authority than the state itself to discriminate against out-of-state residents and encourages the states to induce indirectly that which they cannot constitutionally mandate directly. By effectively removing all municipal conduct from scrutiny, such a holding undermines the vision of and purpose behind the Privileges and Immunities Clause by encouraging economic balkanization and parochial retaliation, as the political subdivisions of the several states eagerly will seek to accomplish the discrimination forbidden to the states themselves.

It is well established that what would be unconstitutional if done directly by a state can no more readily be accomplished by a political subdivision at a state's direction. *See Memorial Hospital v. Maricopa County*, 415

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41. A26.

U.S. 250, 256 (1974). Moreover, a municipality is a creature of the state legislature and has no greater powers than those afforded to the state:

> [M]unicipalities have no inherent right of self-government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. (citation omitted)

City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923).[42] A holding that a municipality, whose existence and powers are derived from the state, may enact a law discriminating against out-of-state residents, would grant a municipality greater constitutional power than its parent, a state.[43]

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42. *Cf. Borough of Sayre v. Phillips*, 148 Pa. 482, 24 A. 76 (1892), in which in striking down an ordinance which exempted borough residents from its peddling licensing requirements, the Pennsylvania Supreme Court stressed:

> When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation . . . It can have no better right to adopt discriminating trade regulations than the state has. 148 Pa. at 489, *Id.*

43. The extent of state control over city power and property was described by this Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907):

> The State . . . at its pleasure may modify or withdraw all [city] powers, may take without compensation [city] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body,

This Court has recognized that a state may not limit out-of-state residents' access to private employment opportunities.[44] Recently, state courts in New Jersey and other jurisdictions have struck down as violative of the Privileges and Immunities Clause state statutes which granted an absolute job preference to state residents on all public works construction projects.[45] The municipal ordinance of the City of Camden, which was approved by the State of New Jersey, permits the City to engage in the very type of discriminatory activity which is proscribed for the State.[46]

NOTE — (Continued)

conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. . .

The New Jersey Supreme Court consistently has recognized the limited nature of the power of the State's municipalities. *See, e.g., Dome Realty, Inc. v. City of Paterson*, 83 N.J. 212, 225, 416 A.2d 334, 341 (1980); *Ringlieb v. Parsippany-Troy Hills Tp.*, 59 N.J. 348, 283 A.2d 97 (1971).

44. *See, e.g., Hicklin v. Orbeck, supra; Mullaney v. Anderson, supra; Toomer v. Witsell, supra; Ward v. Maryland, supra.*

45. *See, e.g., Laborers Local Union No. 374 v. Felton Construction Company, supra; Neshaminy Constructors, Inc. v. Krause, supra; Salla v. County of Monroe, supra; Mass. Council of Construction Employers v. Mayor of Boston, supra.* In *Mass. Council of Construction Employers*, Massachusetts did not appeal that portion of the opinion which invalidated the state public works construction resident preference. *But see People Ex Rel. Holland v. Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N.E. 2d 469 (Ill. 1975), in which the Illinois Supreme Court held that a one year state residency requirement for preference on public works construction projects violates the Equal Protection Clause, but a mere preference for Illinois residents does not violate the Privileges and Immunities Clause. That case was decided prior to this Court's holding in *Hicklin v. Orbeck, supra*, however, and its continuing validity is open to question.

46. Ironically, N.J.S.A. 34:9-2, the State resident preference statute struck down in *Neshaminy Constructors Inc. v. Krause, supra*, applies to the construction of any public work for the state, municipality or any subdivision thereof. Thus, the statute reads in pertinent part:

In the construction of any public work for the state, or any

Moreover, under the lower court's interpretation, a state may circumvent the sanctions of the Privileges and Immunities Clause merely by authorizing or directing each locality to undertake the very kind of discriminatory conduct which a state itself is prohibited from engaging in directly. That which a state is constitutionally powerless to command directly, it is not permitted to induce indirectly. "Nor can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority." *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105, 108 n.5 (1967). (citations omitted).[47]

Not only would the lower court's holding enable a state to induce indirectly that which it cannot command directly, but also it would encourage the municipalities in New Jersey and of every other state independently to decide to accomplish that which the state cannot — achievement of an insulated and isolated economic system under which residents of each city in New Jersey can work in their own city and inhabitants of Delaware

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county, city, town, township or borough, or other municipal corporation or any board, committee, commission or officer thereof . . . preference in employment thereon shall be given to citizens of the state of New Jersey who have resided and maintained domiciles within the state for a period of not less than one year immediately prior to such employment . . .

Although the New Jersey Supreme Court acknowledges the holding of *Neshaminy* (A26, n.8), there is no indication that its holding is being overturned *sub silentio*. Thus, as the law now exists in New Jersey, it is unlawful for a municipality to require private contractors to prefer New Jersey residents but permissible for it to require contractors to prefer city residents.

47. For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by a constitution, an act of the legislature, or an act by any subordinate instrumentality of the State exercising delegated legislative authority like an ordinance of a municipality or an order of a commission. (citations omitted)

Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919).

and Pennsylvania can work nowhere in New Jersey. While Camden residents can work in Camden, Newark residents can work in Newark and Trenton residents can work in Trenton, the out-of-state resident is placed in the same position as he would be under the unconstitutional State enactment — restricted, if not precluded, from access to private employment on public works construction. The "one Nation" which the Privileges and Immunities Clause was designed to create out of "a collection of independent, sovereign States," *Toomer v. Witsell*, *supra*, 334 U.S. at 395, could be just as easily destroyed by independent municipalities acting to further their own parochial interests as by independent, sovereign states. The salutary goals of the Privileges and Immunities Clause would be frustrated if it were rendered impotent by such back-door balkanization.

Moreover, the Privileges and Immunities Clause effectively would be nullified if a law were immunized from scrutiny merely because it was enacted by a municipality, rather than by the state. For example, such a holding would permit a municipality to limit private employment to city residents and confine private medical care to citizens residing within the municipality. Similarly, under this logic, the Alaska Hire Act struck down in *Hicklin v. Orbeck* would have been saved if Anchorage, rather than the State of Alaska, had enacted the identical law. Such results are repugnant to the underlying objectives of the Clause.[48]

In addition, because the underlying objective of the Clause is to protect out-of-state residents from discrimination, the fact that some in-state residents as well as all out-of-state residents are disadvantaged does not immu-

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48. This Court has emphasized that because nonresidents are unrepresented in the decision making body's political processes, Privileges and Immunities Clause challenges are subjected to a "substantially more rigorous" standard of review to "reflect an appropriately heightened concern" for the integrity of the Privileges and Immunities Clause. *Austin v. State of New Hampshire*, *supra*, 420 U.S. at 662-63.

nize the Camden ordinance from constitutional review.[49] The exclusion effectuated against all non-New Jersey residents by the Camden ordinance is not eliminated or ameliorated by the fact that other New Jersey residents who are not residents of Camden are similarly victimized.

Recently, Justice O'Connor in a concurring opinion in *Zobel v. Williams*, ____ U.S. ____, 102 S.Ct. 2309 (1982), implicitly rejected the narrow view adopted by the New Jersey Supreme Court that the Privileges and Immunities Clause is not implicated when an ordinance distinguishes between classes of state residents as well as excludes all out-of-state residents. In *Zobel v. Williams, supra*, this Court struck down as unconstitutional an Alaskan plan to distribute a portion of state revenues according to length of residency within the State. Chief Justice Burger, writing for the majority, found the statute violative of the Equal Protection Clause because Alaska failed to show any valid state interests rationally related to a distribution scheme based on duration of state citizenship.

In a concurring opinion, Justice O'Connor would have invalidated the statute on the basis of the Privileges and Immunities Clause. In her opinion, Justice O'Connor rejected the argument that the Privileges and Immunities Clause applies exclusively to discrimination between residents of different states. Rather, she indi-

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49. The reach of the Clause has never been limited to its literal language. Thus, in *Mullaney v. Anderson, supra*, the Privileges and Immunities Clause was invoked to strike down a discriminatory licensing fee of the Territory of Alaska, even though the Clause specifically refers to "state" action.

Similarly, although the Clause is limited to protecting rights of citizens, this Court recently stressed in *Hicklin v. Orbeck, supra*, 437 U.S. at 524 n.8: "It is now established that the terms "citizen" and "resident" are 'essentially interchangeable . . .' for purposes of analysis of most cases under the Privileges and Immunities Clause of Art. IV, §2" (citations omitted).

cated that the Clause also applies to discrimination among classes of residents within the same state:

> It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme classifies citizens on the basis of their former residential status, imposing a relative burden on those who migrated to the State after 1959. Residents who arrived in Alaska after that date have a less valuable citizenship right than do the oldtimers who preceded them . . . The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the state on less favorable term than those who arrived earlier. *The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that 'the citizen of State A who ventures into [Alaska]' to establish a home labors under a continuous disability.* ____ U.S. at ____, 102 S. Ct. at 2320-2321 (emphasis added).

We have not located a single authority which has held a local ordinance immune from review under the Privileges and Immunities Clause merely because the regulations disadvantaged *some* in-state residents as well as *all* out-of-state residents. On the contrary, courts have invalidated local ordinances under the Privileges and Immunities Clause, regardless of the fact that such ordinances also may have burdened other in-state residents.[50] Thus, almost a century ago, the Kentucky Su-

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50. *See, e.g., Ward v. Maryland, supra; Ward Baking Co. v. City of Fernandina*, 29 F.2d 789 (S.D. Fla. 1928) (ordinance fixing

preme Court, in striking down a municipal ordinance which imposed a higher licensing tax on non-city residents, rejected the argument that a local ordinance is valid if it burdens some state residents as well:

> The ordinance under which this payment was exacted applies to the resident of the State as well as the non-resident, and no one having his place of business outside of the city limits is allowed to sell by sample unless he pays the license imposed, and the fact that its provisions apply to the resident of the State as well as the non-resident, does not add to the validity of the act, or give strength to the argument in support of it.

NOTE — *(Continued)*

higher license tax to be paid by nonresident bakeries delivering within the city than for resident bakeries violates both the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Mercer*, 132 Md. 263, 103 A.570 (1918) (ordinance imposing higher licensing fees on noncounty residents is invalid under the Privileges and Immunity Clause and the Fourteenth Amendment); *State v. Nolan*, 108 Minn. 170, 122 N.W. 255 (1909) (city ordinance regulating hawkers and peddlers within the municipality, excluding bona fide local residents from its provisions, deprives nonresidents of both equal protection of the law and of a privilege and immunity enjoyed by the resident citizen); *Commonwealth v. Snyder*, 182 Pa. 630, 38 A.356 (1897) (license fee which exempts peddlers residing in the county violates the Constitution); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N.E. 609 (1886) (license ordinance which applied only to peddlers who are non-city residents and to goods manufactured outside of the county violates the Privileges and Immunities Clause); *McGraw v. Town of Marion*, 98 Ky. 673, 34 S.W. 18 (1896) (city ordinance requiring all transients other than citizens of the city to pay license tax whenever selling any goods within the municipality violated the Privileges and Immunities Clause); *In re Jarvis*, 66 Kan. 329, 71 Pac. 576 (1903) (Kansas statute requiring peddler to procure license but exempting peddlers working in the county where they reside is repugnant to the Privileges and Immunities Clause). *Cf. Construction and General Laborers Union Local 563 v. City of Saint Paul*, 270 Minn. 427, 134 N.W.2d 26 (1965) (local ordinance which compels all contractors who perform work for the municipality to employ only county residents held to be unconstitutional).

Fecheimer v. City of Louisville, 84 Ky. 306, 309, 2 S.W. 65, 66 (1886).

In an analogous situation under the Commerce Clause, this Court held in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951), that it is "immaterial" that the Madison ordinance subjected some intra-state concerns to the same discriminatory treatment as firms from out of state.[51] The critical element in finding impermissible discrimination in *Dean Milk* and the case at bar is that in both instances all out-of-state residents are subject to discrimination by being denied access to a local market, and selected local residents are beneficiaries of this discrimination, based solely on their state of residence. It is of little consequence to *all* of the non-New Jersey residents who are denied access to a significant portion of the public works employment opportunities in the City of Camden that some New Jersey residents are similarly burdened.

Permitting Camden to penalize out-of-state residents merely invites retaliation, which was one of the very evils which the adoption of the Constitution was designed to eliminate. *Austin v. State of New Hampshire, supra*, 420 U.S. at 667. Rather than encouraging economic welfare, the Camden resident hiring quota will merely foster internecine economic warfare, resulting in the kind of balkanization and conflict among the states which the Privileges and Immunities Clause sought to heal. When a classification utilizes residency as the sole ground to deny all out-of-state citizens access to private employment, such a legislative distinction must be carefully scrutinized under the Privilege and Immunities Clause, and it is not exempt from constitutional review

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51. *Cf. Brimmer v. Rebman*, 138 U.S. 78, 82-3 (1891); *Minnesota v. Barber*, 136 U.S. 313, 326 (1890) ("A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.") (citations omitted)

merely because some in-state residents are also disadvantaged.

D. The Camden Ordinance Is Invalid Because There Is No Proof That Nonresidents Constitute a "Peculiar Source of the Evil" at Which the Ordinance Is Aimed and That the Discrimination Practiced Bears a Substantial Relationship to the Particular "Evil" That the Nonresidents Are Said to Present.

Because access to private employment opportunities is safeguarded by the Privileges and Immunities Clause and the Camden ordinance is subject to scrutiny by excluding all out-of-state residents from such access, then the only issue remaining is whether the ordinance meets the Privileges and Immunities Clause test adopted by this Court. Under established principles, it does not pass constitutional muster.

It is beyond dispute that the Privileges and Immunities Clause is not absolute and certainly "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell, supra,* 334 U.S. at 396. Rather, it bars discrimination against citizens of other states only "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* Under the two-pronged test established in *Toomer v. Witsell, supra,* a "substantial reason for the discrimination" would not exist ". . . unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed," *Id.* 398, and there is a "reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." *Id.* 399.[52]

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52. As one commentator has concluded regarding *Toomer*:

The State's interests in conserving shrimp and paying the costs of doing so were insufficient because the state failed to establish 1) a sufficiently *unique* link between the interests served and the discrimination practiced; 2) a sufficiently *dem-*

Following the standards established in *Toomer*, this Court recently held in *Hicklin v. Orbeck*, 437 U.S. 518 (1978) that a resident preference requirement imposed by state law on private contractors engaged in construction work related to Alaska's oil and gas leases which was designed to alleviate high unemployment violated the Privileges and Immunities Clause. This Court observed that even if "a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents" — a proposition itself considered "dubious", *Id.* 526, the Alaska Hire law was still constitutionally invalid. The Court stressed that there was no showing that nonresidents were "a peculiar source of the evil" of high unemployment that the statute was enacted to remedy:

> What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents . . . were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities . . .

Id. 526-27. Moreover, the Court reasoned that even if the State had demonstrated that nonresidents were a "peculiar source of the evil," the statute still violated the second prong of the *Toomer* test, because the discrimination effected by the statute against nonresidents did not bear a substantial relationship to the particular "evil" they were said to represent:

NOTE — (Continued)

onstrated link between the legitimate interests served and the discrimination practiced; and 3) the actual impracticality of apparent and less *restrictive alternatives*. . . (footnotes omitted, emphasis in original).

L. TRIBE, AMERICAN CONSTITUTIONAL LAW §6-33 at 409-410 (1977).

> Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job training program . . . Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

Id. 527-28.[53]

The analogy to the case at bar is compelling. The Camden ordinance was purportedly enacted to reduce unemployment. But the fact that the objective may be

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53. Following this rationale, courts in New Jersey in *Neshaminy Constructors, Inc. v. Krause, supra*, New York in *Salla v. County of Monroe, supra*, Massachusetts in *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra*, and Washington in *Laborers Local Union No. 374 v. Felton Construction Company, supra*, have struck down state statutes which granted an absolute job preference to state residents on all public works construction projects. Like the State of Alaska in *Hicklin*, the State of New York sought to justify its resident preference as necessary to relieve unemployment. In finding this purpose insufficient, the New York Court of Appeals emphasized:

> Granted that the counteracting of unemployment is a legitimate State concern, the relevant criteria for privileges and immunities analysis still are whether non-residents are a 'peculiar source' of the evil of joblessness in New York and whether the statute is fashioned with sufficient precision to meet the problem without unduly impinging on the rights of those who do not contribute to it. In the end, nothing less than a unique link between the interest served and the discrimination practiced will do. *Salla v. County of Monroe, supra*, 48 N.Y.2d at 523, 399 N.E. 2d at 913-14, 423 N.Y.S.2d at 882.

legitimate does not authorize Camden to employ constitutionally impermissible means to achieve that objective:

> But in any event, appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which . . . is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.

Toomer v. Witsell, supra, 334 U.S. at 397-98. Moreover, this Court has never held that a state may, consistent with the Privileges and Immunities Clause, attempt to alleviate unemployment problems by requiring private employers to exclude nonresidents.[54]

Secondly, Camden has offered no evidence whatsoever that nonresidents "constitute a peculiar source of the evil at which the [discriminatory] statute is aimed," *Toomer v. Witsell, supra*, 334 U.S. at 398. The City has

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54. Nor can it be realistically argued that the affected employees are public employees. Camden does not hire them, fire them, pay them, set terms and conditions of their employment or negotiate with them or their representatives about their employment. In the case of employees of subcontractors and those referred by union hiring halls, Camden has absolutely no relation with the subcontractor or hiring hall other than that the city is the site of the job. *Cf. White v. Massachusetts Council of Construction Employers, supra*, 103 S. Ct. at 1052-53 (Blackmun, J., concurring in part and dissenting in part). That the project is financed in part by public money does not convert a private person into a municipal employee. *See, e.g., Rendell-Baker v. Kohn*, ____ U.S. ____, 102 S. Ct. 2764, 2771 (1982). ("The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts").

not demonstrated that the influx into Camden of nonresidents seeking employment either caused or substantially exacerbated the City's unemployment dilemma. Moreover, the ordinance, in barring nonresidents from competing for construction jobs in Camden, will simply result in exporting the problem of unemployment — a solution heretofore not permitted by the Federal Constitution. *Edwards v. California*, 314 U.S. 160 (1941).

Ironically, the New Jersey Legislature has specifically mandated in the Local Public Contracts Law that a municipality may *not* "[r]equire that any bidder be a resident of, or that his place of business be located in the county or municipality in which the purchase will be made or the contract or agreement performed . . ." N.J.S.A. 40A:11-13. Thus, Camden is precluded from requiring that the general contractor with whom it has direct dealings be a municipal resident but is seeking to regulate relationships among wholly private parties, *i.e.*, subcontractors and their employees and union hiring halls, entities with which the City has no relationship whatsoever.

Even if the City demonstrates that nonresidents are "a peculiar source of evil," the discrimination must bear "a substantial relationship to the particular evil . . . [nonresidents] are said to present" for the ordinance to survive constitutional scrutiny. *Hicklin v. Orbeck*, *supra*, 437 U.S. at 527. In the case at bar, the ordinance is certainly not "closely tailored" to the legitimate ends sought to be achieved. The ordinance does not draw its preference in terms of "unemployed residents," but instead only in terms of Camden residents, offering an across-the-board blanket preference to all long term City resident-employed or unemployed, rich or poor. Thus, Camden can offer no substantial reason for the onerous burden placed on out-of-state residents "beyond the mere fact that they are citizens of other States." *Toomer v. Witsell*, *supra*, 334 U.S. at 396.[55]

55. Nor can *Hicklin* be distinguished on the ground that the prohibition at issue in that case applied not only to those directly holding state-issued oil and gas leases, but also to subcontractors

Unemployment is a blight on the national landscape which knows no political or geographic boundary.[56] Whether it ever might be constitutional for a municipal-

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NOTE — (*Continued*)
and suppliers who had no direct dealings with the State. 437 U.S. at 531. Yet, the same is true in the case *sub judice*; the Camden ordinance applies not only to general contractors in privity with the city, but also to subcontractors and union hiring halls, although "none of these . . . have direct dealing with the [City] . . ." *Id.* 530. Moreover, the Camden ordinance by its very terms applies to public works construction, residential housing and any transaction in which the city might confer a financial benefit, excluding a tax abatement. Certainly, it cannot be said that the terms of the ordinance are narrowly drawn. Finally, that portion of the *Hicklin* opinion describing the breadth of Alaska Hire was in response to the State's argument [(based on *McCready v. Virginia*, 94 U.S. 391 (1877)] "that because the oil and gas that are the subject of Alaska Hire is *owned* by the state, this ownership, of itself, is sufficient justification for the Act's discrimination against nonresidents, and leaves the act totally without the scope of the Privileges and Immunities Clause." *Id.* 528 (footnote omitted, emphasis in original). Such an argument is inapposite here, because construction jobs are not a resource as that term has been used in *McCready*, *supra*, and its progeny. In addition, as the lower court indicated in *Hicklin v. Orbeck*, 565 P.2d 159, 161 n.1 (Alaska 1977), Alaska Hire as of June 1976 would apply to approximately six per cent of the total employment in the state.

56. Thus, while the stated purpose of the Camden resident preference ordinance was to reduce unemployment, according to the United States Bureau of Labor Statistics, unemployment in the City of Philadelphia in 1981 was 12.5 per cent, black unemployment 21.2 per cent and black male unemployment 22.7 per cent. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, GEOGRAPHICAL PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, 1981 BULLETIN 2156 at 97, and 103 (December 1982). The problem of unemployment is continuing to increase. In April, 1983, while the national unemployment rate fell to 10.2 per cent and in New Jersey the rate fell to 7.4 per cent, in Pennsylvania, the unemployment rate was 13.2 per cent, the second highest of the ten largest states. *The Philadelphia Inquirer*, 1 (May 7, 1983). Unemployment among males in Pennsylvania during the first quarter of 1983 was 17.5 per cent. *The Philadelphia Inquirer*, 1-D (May 15, 1983). The Department of Labor's 1982 statistics show a rise of the unemployment rate for Philadelphia to 13.9 per cent and the rate for blacks was 21.0 per cent. U.S. Department of Labor, Bureau of Labor Statistics, unpublished statistics.

ity to attempt to ease its unemployment problems by requiring private employers to exclude all nonresidents from access to a significant segment of employment opportunities "a policy which may present serious constitutional questions," *Hicklin v. Orbeck, supra,* 437 U.S. at 528, *Hicklin* clearly stands for the proposition

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According to the Department of Labor, during 1981 Philadelphia lost 6,000 jobs. This was the eleventh decrease in the past twelve years. Since 1974, Philadelphia has lost 70,000 jobs. In the construction industry, the number of available jobs in Philadelphia decreased by 3.4 per cent during 1981. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, PHILADELPHIA EMPLOYMENT TRENDS, 1981, REGIONAL REPORT 56 (1982). Unemployment in the construction industry was 20.6 per cent in 1981. U.S. DEPARTMENT OF LABOR, GEOGRAPHICAL PROFILE. Nationally, in October, 1981, construction workers had an unemployment rate of 18 per cent, a rate higher than that of any other occupation in the nation. Note, *Construction Worker Residency Requirements: A Constitutional Response,* 17 NEW ENG. L. REV. 461 n.2 (1982). The problem of black youth unemployment in Philadelphia is even more distressing. Department of Labor statistics show that among certain age groups the unemployment rate is as high as 32.2 per cent. U.S. Department of Labor, Bureau of Labor Statistics, unpublished statistics. According to a recent report of the Urban League of Philadelphia:

> [n]owhere in the United States — with the possible exception of Detroit — has the problem of minority youth unemployment reached the crisis proportions that it has in Philadelphia . . . In Philadelphia, the [official] unemployment rate [minority] 16 to 19 years old was 32.1 percent — a rate topped only by Detroit where 39.8 per cent of those in that age group were unemployed. The national teenage unemployment rate is just under 18 percent . . . According to the National Urban League's calculations, the black unemployment in an area is generally about twice that of the official rate for the population as a whole. Called the Hidden Unemployment Index, this formula counts discouraged workers no longer looking for work as well as those working part-time who are actually seeking full-time jobs. Under this index, the black youth unemployment rate in Philadelphia was probably more than 60 percent in 1980 and is still rising.

Johnson, The Dilemma of Youth Unemployment, in THE STATE OF BLACK PHILADELPHIA 1982, 73, 75 (Urban League of Philadelphia, 1982).

that it cannot do so through an "across-the-board grant of job preference to all its residents." *Id.* That is precisely what Camden has sought to do here. To uphold the constitutionality of the Camden resident preference ordinance would compromise significantly the underlying vision of the Privileges and Immunities Clause and encourage the division and divisiveness which the Clause was designed to dispel.

E. Even If This Court Finds That Camden Is Acting as a Market Participant, Camden's Exclusion of Out-of-State Residents from Access to Employment Opportunities Is Not Immunized from Scrutiny under the Privileges and Immunities Clause.

Recently, this Court held in *White v. Massachusetts Council of Construction Employers*, ____ U.S. ____, 103 S. Ct. 1042 (1983) that an executive order of the Mayor of Boston requiring at least half of the work force on city funded public construction projects to be bona fide city residents did not violate the Commerce Clause because the City was acting merely as a market participant. Relying upon *Hughes v. Alexandria Scrap Corp.* 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court stressed that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White, supra*, 103 S. Ct. at 1044. The fact that a city's ordinance may burden interstate commerce is irrelevant, for if the "city is a market participant then the Commerce Clause establishes no barrier" to placing conditions on private employment. *Id.* 1046. However, the *White* ruling is not dispositive of the Privileges and Immunities issue presented in this case.[57] To so hold is to

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57. Indeed, the Court specifically refused to rule on the Privileges and Immunities challenge to the Boston executive order. *Id.* 1048 n.12.

overlook the vital differences between the reach and purposes of the Privileges and Immunities Clause and those of the Commerce Clause.[58]

Unlike the Commerce Clause, which applies an implied restraint on state action,[59] the Privileges and Immunities Clause imposes a direct limitation on governmental action. As a charter of personal rights,[60] the Clause is not concerned with the method employed to effectuate the exclusion, but with the discriminatory conduct itself. The Clause constitutes an express denial of the right of any state to make residency alone the basis for any act of discrimination. Thus, the distinction between market participation and market regulation is irrelevant to Privileges and Immunities Clause analysis. Rather, the Clause by its very terms must apply to *all* governmental action, regardless of the characterization of the government's role in the marketplace.[61]

Moreover, unlike the Commerce Clause, which re-

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58. Conduct permissible under the Commerce Clause is not necessarily lawful under other sections of the Constitution. *See, e.g., National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976); *City of Rome v. United States*, 446 U.S. 156, 178-79 (1980) (and cases cited therein.)

59. *See* Eule, *Laying the Dormant Commerce Clause To Rest*, 91 YALE L. J. 425 (1982).

60. The fact that corporations are not "citizens" within the protection of the Privileges and Immunities Clause, *Paul v. Virginia*, *supra*, indicates the Clause's importance as a safeguard of individual liberty.

61. As one commentator has emphasized:

> Discrimination is necessarily a central issue, however, in privileges and immunities litigation under Article IV . . . The commerce clause, of course, could have served as a unifying and centralizing force of a comparable sort-and indeed has served something like that function . . . But it would have been more difficult for the commerce clause [as opposed to the privileges and immunities clause] to serve as a charter of personal rights secure against *all* governmental action. (citations omitted, emphasis in original).

L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra*, §6-5 at 327 n.7 and §6-32 at 405 n.4.

quires a showing of a burden on interstate commerce, Privileges and Immunities Clause protection is triggered even when there is no indication of interference with interstate commerce. The Clause protects the right of out-of-state residents to participate in the common market on an equal footing with all in-state residents, regardless of whether the activity involves interstate or intrastate business. The purpose of the Clause is to outlaw classifications based on non-citizenship unless nonresidents are "a peculiar source of evil" and unless the discrimination bears "a substantial relationship to the particular 'evil' they are said to present." *Hicklin v. Orbeck, supra,* 437 U.S. at 527. Any enactment, including the Camden resident preference ordinance, which is passed for no reason other than to exclude nonresidents, must be subject to heightened scrutiny. *Austin v. State of New Hampshire, supra,* 420 U.S. at 663.

There is perhaps no economic right as important to the citizens of this land than the right to travel throughout the country and ply their trade without exclusion and discrimination. To the out-of-state resident denied an opportunity for access to work in the private sector based solely on state of residency, the barriers erected by the Camden ordinance are no less severe or imposing whether a result of the city acting as a market regulator or participant. Immunizing Camden's parochial practices because of its alleged market participation would ignore the underlying vision and promise of the Privileges and Immunities Clause.

II. THE CAMDEN ORDINANCE'S ONE YEAR DURATIONAL RESIDENCY REQUIREMENT FOR PREFERENCE FOR AT LEAST FORTY PER CENT OF THE JOBS WITH PRIVATE CONTRACTORS ON PUBLIC WORKS CONSTRUCTION PROJECTS VIOLATES THE EQUAL PROTECTION CLAUSE, BECAUSE THE REQUIREMENT PENALIZES THE FUNDAMENTAL RIGHT OF INTERSTATE TRAVEL.

A. The Durational Residency Requirement Imposed By the Camden Ordinance Penalizes the Fundamental Right of Interstate Travel.

Even if this Court finds that the lower court did not err in holding that the Camden resident hiring quota was constitutional under the Privileges and Immunities Clause of Article IV, §2, the City's ordinance, by imposing a durational residency requirement, impinges on the fundamental constitutional right of interstate travel and violates the Equal Protection Clause of the Fourteenth Amendment, unless justified by a compelling state interest. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). In upholding the ordinance, the New Jersey Supreme Court completely ignored the distinction that has been drawn in "right to travel" cases between continuing and durational residency requirements and failed to recognize that the Camden ordinance impermissibly denies access to private employment opportunities based on length of residency.

For more than a century, this Court has emphasized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to protect a person's right to travel, migrate, resettle, find a new job and start a new life without suffering legal disabilities. *See, e.g., Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1868); *Edwards v. California*, 314 U.S. 160 (1941);

Dunn v. Blumstein, *supra*, 405 U.S. at 338-39; *Memorial Hospital v. Maricopa*, *supra*, 415 U.S. at 254-55.[62]

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.

Shapiro v. Thompson, *supra*, 394 U.S. at 629. As stressed by Chief Justice Taney in the *Passenger Cases*:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as free as in our own States.

48 U.S. (7 How.) 283, 492 (1849).

The right of interstate travel has been repeatedly af-

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62. The right to travel is deeply rooted in Anglo-American Jurisprudence. *See* 1 W. BLACKSTONE, COMMENTARIES 134 (the right of "removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due cause of law" is integral to the concept of liberty). The right to travel can be found in the Magna Carta, which guaranteed free passage into and out of the realm, MAGNA CARTA, Ch. 42 (1215), cited in Note, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L. REV. 1129, n.3. The Articles of Confederation provided that ". . . to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall have free ingress and regress to and from any other state . . . ARTICLES OF CONFEDERATION art IV, para. 1 (1781). The Framers of the Constitution made no explicit mention of the right to travel in the Constitution itself, presumably because the concept of free movement was so basic to the very idea of a federal union that outright mention would have been redundant. Z. CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 at 184-187 (1st ed. 1956).

firmed as a basic constitutional right. *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 255.[63] Although the textual source of this right has been the subject of debate,[64] its fundamental nature is now beyond dispute. *Jones v. Helms*, 452 U.S. 412, 418 (1981). In *United States v. Guest*, 383 U.S. 745 (1966), the Court explained that:

> . . . [t]he Constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution . . . (citations omitted).

Id. 757-58.

Over the past fifteen years, this Court has consistently invalidated durational residency requirements which have been found to impermissibly burden and penalize the fundamental right to interstate travel. *See*,

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63. Indeed, this Court recently observed that "[t]he constitutional right of interstate travel is virtually unqualified." *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (*per curiam*).

64. Supreme Court decisions have located the source of the right to travel in various constitutional provisions, including the Privileges and Immunities Clause of Article IV §2, *Ward v. Maryland*, *supra*, 79 U.S. (12 Wall) at 430; the Commerce Clause, *Edwards v. California*, *supra*, 314 U.S. at 177; the Privileges and Immunities Clause of the Fourteenth Amendment, *Id.* at 178 (Douglas, J., concurring); *Id.* at 181-83 (Jackson, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); and the due process clauses of the fifth and fourteenth amendments, *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Shapiro v. Thompson*, *supra*, 394 U.S. at 671 (Harlan, J., dissenting).

e.g., *Shapiro v. Thompson*, *supra* (one year waiting period for welfare benefits); *Dunn v. Blumstein*, *supra* (one year state and three month county residency requirements for voting); *Memorial Hospital v. Maricopa County*, *supra* (one year residency requirement for county funded nonemergency medical care). In striking down such classifications, this Court has stressed that they "impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." *Dunn v. Blumstein*, *supra*, 405 U.S. at 342.[65] Durational residency requirements create two classes of needy resident families, indistinguishable from each other except by length of residence. *Shapiro v. Thompson*, *supra*, 394 U.S. at 627. By denying basic necessities of life, such as welfare and medical care, durational residency classifications operate " 'to *penalize* those persons . . . who have exercised their constitutional right of interstate migration' [and] must be justified by a compelling state interest."[66]

Nor has the Court found it necessary to show that the durational residency requirement actually deterred residents from moving:

> *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. (footnote omitted)

Dunn v. Blumstein, *supra*, 405 U.S. at 339-40. Rather,

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65. As this Court recently stressed: "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer-term residents." *Zobel v. Williams*, *supra*, 102 S.Ct. at 2312 n.6.

66. *Memorial Hospital v. Maricopa County*, *supra*, 415 U.S. at 258 (citations omitted, emphasis in original.)

> Not unlike the admonition of the Bible that 'Ye shall have one manner of law, as well for the stranger, as for one of your own country,' Leviticus 24:22 (King James Version) the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.

Memorial Hospital v. Maricopa County, *supra*, 415 U.S. at 262. Durational residency requirements penalizing the right to migrate are violative of the Equal Protection Clause " 'unless shown to be necessary to promote a *compelling* governmental interest' " *Id.* (citation omitted, emphasis in original).

Similarly, lower courts relying on this Court's rationale in *Shapiro* and its progeny have struck down durational residency requirements which have been imposed as qualifications for vital services and economic benefits such as welfare,[67] medical care,[68] public housing[69] and veterans' benefits.[70]

The City of Camden, by restricting access to private employment opportunities on public works construction

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67. *See, e.g., Butler v. Breyer*, 355 F. Supp. 405 (S.D. Ohio 1972) (three-judge court) (State relief for the poor); *Baxter v. Birkins*, 311 F. Supp. 222 (D. Colo. 1970) (three-judge court) (ADC benefits); *Sheard v. Department of Social Welfare*, 310 F. Supp. 544 (N.D. Iowa 1969) (three-judge court) (State old age assistance). Statutes have been invalidated when the municipal durational residency requirement was allegedly adopted as a health measure to alleviate an acute housing shortage, *Demiragh v. DeVas*, 476 F.2d 403 (2d Cir. 1973) (when housing vacancy rate falls below 2 per cent, city welfare payments limited to residents who have resided for longer than a year); and when the requirement was purportedly adopted to improve depressed economic conditions of a state, *Besaw v. Affleck*, 333 F. Supp. 775 (D.R.I. 1971) (three-judge court); *Rivera v. Dunn*, 329 F. Supp. 554 (D. Conn. 1971) (three-judge court), *aff'd mem.*, 404 U.S. 1054 (1972); *Cf. Pease v. Hansen*, 404 U.S. 70 *rev. mem.*, 157 Mont. 99, 483 P.2d 720 (1971) ("Whether or not a welfare program is or is not federally funded is irrelevant to the

Notes continued on next page

to residents who have lived within the City for at least a year, is discriminating between new and long term residents, indistinguishable in every respect, except that the former individuals are denied access to employment opportunities merely because they have exercised their constitutional right to travel. Thus, Camden is forcing a person who wishes to travel and change residence to choose between travel and access to employment opportunities. *See Dunn v. Blumstein, supra*, 405 U.S. at 342.

This Court has repeatedly recognized that access to the common occupations of life is of the very essence of personal freedom and opportunity which the Fourteenth Amendment was adopted to secure. In *Smith v. Texas*, 233 U.S. 630, 641 (1914), by invalidating a law that criminally penalized anyone who served as a freight train conductor without having previously served as a brakeman, thereby excluding numerous equally quali-

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NOTE — (Continued)
constitutional principles enunicated in *Shapiro v. Thompson* . . .") (citations omitted).

68. *Valenciano v. Bateman*, 323 F. Supp. 600 (D. Ariz. 1971) (three-judge court) (one year county residency prior to receipt of free medical care); *Crapps v. Duval County Hospital Authority*, 314 F. Supp. 181 (M.D. Fla. 1970) (one year county residency prior to receipt of free medical care); *Vaughan v. Bower*, 313 F. Supp. 37 (D. Ariz.) (three-judge court), *aff'd mem.*, 400 U.S., 884 (1970) (one year durational residency requirement for commitment to state mental hospital).

69. *See, e.g., Cole v. Housing Authority*, 435 F.2d 807 (1st Cir. 1970) (two year waiting period for subsidized public housing); *King v. New Rochelle Municipal Housing Authority of City of Newport*, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971) (five year residency requirement for admission to public housing).

70. *See, e.g., Strong v. Collatos*, 593 F.2d 420 (1st Cir. 1979) (three year residency requirement for receipt of certain veterans' welfare benefits). For a summary and analysis of many of the cases on durational residency requirements *see* Note, *Durational Residency Requirements From Shapiro Through Sosna: The Right To Travel Takes A New Turn*, 50 N.Y.U.L. REV. 622 (1975).

fied employees from that position, the Court recognized that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families." The Court went on to stress:

> In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawfull calling.

Id. 636. The following year in *Truax v. Raich*, 239 U.S. 33 (1915), in which the Court struck down an Arizona statute which limited any business employing more than five workers from hiring more than twenty per cent resident aliens, Justice Hughes in delivering the opinion for the Court stated emphatically:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. (citations omitted)

Id. 41.

Recently, in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976), this Court struck down a civil service regulation banning aliens from federal employment, basing its ruling in part upon the importance of access to employment opportunities: "The added disadvantage resulting from the enforcement of the rule — ineligibility for employment in a major section of the economy — is of sufficient significance to be characterized as a depri-

vation of an interest in liberty."[71] *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 322-23 (Marshall, J., dissenting); *Keenan v. Board of Law Examiners of North Carolina*, 317 F. Supp. 1350, 1362 (E.D.N.C. 1970) ("The right to work for a living in one's chosen occupation is for most people a prerequisite to the pursuit of happiness. If a man may be arbitrarily made to give up his life time endeavor — even for a year — in order to move his residence, it is idle to talk to him about Fourteenth Amendment protection of personal freedom"); *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 579, 79 Cal. Rptr. 77, 86, 456 P.2d 645, 654 (1969) ("Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness . . .").

Although this Court has never considered the question of durational residency requirements for access to private employment opportunities, lower courts almost

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71. Although both *Truax* and *Mow Sun Wong* are alienage cases, and the Court has often applied strict scrutiny to legislation disfavoring this class, *see, e.g., Graham v. Richardson*, 403 U.S. 365 (1971), such a characterization does not minimize the importance of the historical significance of personal interests in employment. *Truax* was decided before the Court recognized a stricter level of review for suspect classifications. *United States v. Caroline Products Co.*, 304 U.S. 144, 152 n.4 (1938). *Mow Sun Wong* was decided on due process, not equal protection grounds; the existence of a significant liberty interest in public employment, not the suspect nature of the class, determined the outcome. 426 U.S. at 116-17. Moreover, in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), in which the Court invalidated a state statute that banned certain resident aliens from state financial assistance for higher education, Chief Justice Burger dissented on the grounds that the previous alienage cases involved the much more important interests of "engaging in certain occupations or professions" which thereby impaired "their ability to earn a livelihood" or the interest of obtaining welfare benefits. *Id.* 12-13.

universally have invalidated state[72] and local[73] durational residency laws which limit such access. These courts have struck down durational residency requirements which restricted government employment, private employment on public projects and work in connection with construction of oil and gas pipelines,[74] commercial fishing,[75] and veterans' preference in public employment.[76]

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72. *See, e.g., Nehring v. Ariyoshi*, 443 F.Supp. 228 (D. Hawaii 1977) (one year state residence requirement imposed on applicants for state and local government jobs); *Justice v. Manzagol*, 11 E.P.D. ¶10,758 (D.N.M. 1976) (one year residency for all state nonprofessional employees); *Costa v. Bluegrass Turf Service, Inc.*, 406 F.Supp.1003 (D. Ky. 1975) (statute requiring one year residency for employees of state-licensed liquor stores); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (personnel rules giving absolute hiring preference to one year Alaskan residents).

73. *Spradling v. Hutchinson*, 253 S.E. 2d 371 (W. Va. 1979) (requirement that applicant for police officer must have been resident of city where he is applying or of county in which city is situated for at least one year prior to his application); *Eggert v. City of Seattle*, 81 Wash. 2d 840, 505 P.2d 801 (1973) (city charter provision favored one year city or county residents for municipal employment); *Cooperrider v. Civil Service Commission of San Francisco*, 97 Cal. App. 3d. 495, 158 Cal. Rptr. 801 (Ct. App. 1979) (Civil Service Commission rule imposing one year durational residency requirement on applicants for municipal employment).

74. *People Ex Rel. Holland v. Bleigh Construction Co.*, 61 Ill.2d 258, 335 N.E.2d 469 (1975) (one year durational residence in state for preference for employment on public works projects); *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977) (any residency requirement for employment on all construction in connection with oil and gas pipelines in excess of thirty days is unconstitutional; not appealed to the Supreme Court, 437 U.S. at 522).

75. *Hassan v. Town of East Hampton*, 500 F.Supp.1034 (E.D.N.Y. 1980) (one year of town residence required to obtain commercial shellfishing license); *Massey v. Apollonio*, 387 F.Supp. 373 (D.Maine 1974) (statute requiring presence within state for at least 8 months of each year for three successive years to receive lobster fishing license).

76. *Carter v. Gallagher*, 337 F.Supp. 626 (D. Minn.) *aff'd*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (five year residency requirement for veterans' preference); *Stevens v. Campbell*, 332 F.Supp. 102 (D.Mass. 1971) (five year consecutive residence in state for preference in employment in classified civil service).

The effect of the Camden resident preference is to deny new residents the essential means of economic survival.[77] Access to employment opportunities is as much a necessity of life[78] as the ability to obtain welfare

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77. Nor is it relevant that the durational residency requirement bars new residents from forty rather than one hundred per cent of the construction jobs. To the resident who is excluded for an impermissible reason, it is little consolation that the exclusion only applies to forty per cent of the jobs on each construction project. Moreover, if Camden is empowered to deny bona fide residents who have lived in the City less than a year access to forty per cent of such jobs, it appears equally empowered to deny new residents access to eighty per cent of all of the private jobs on public works construction. *See Truax v. Raich*, *supra*, 239 U.S. at 42-43; *Nyquist v. Mauclet*, *supra* 432 U.S. at 9; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). Indeed, the forty per cent resident preference in the Camden ordinance is only a minimum requirement (A56).

78. Nor does the fact that there is no fundamental constitutional right to public employment, *see, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) compel a contrary conclusion. There is no fundamental right to welfare, *Dandridge v. Williams*, 397 U.S. 471, 483 (1970), nor to non-emergency medical care, but strict scrutiny was still applied in *Shapiro v. Thompson*, *supra*, and *Memorial Hospital v. Maricopa County*, *supra*, because the residency requirement penalized the fundamental right of interstate travel. By merely stating that "[t]he right to employment on a local public works project" is not a fundamental right and applying a rational basis test (A28), the New Jersey Supreme Court ignored the precedent of this Court and overlooked the pervasive injury inflicted by the Camden ordinance.

79. Many of those cases which have applied strict scrutiny in striking down durational residency restrictions placed on employment have considered access to employment opportunities a basic necessity of life. In *Nehring v. Ariyoshi*, the district court explained that ". . . employment is the only way for people to provide themselves with the necessities of life." *Id.* 237. Similarly, in *Hassan v. Town of East Hampton*, *supra*, in striking down a residency requirement for obtaining a fishing license, the court concluded:

> . . . [T]he level of impact of the East Hampton ordinance challenged here is clearly sufficient to trigger the strict scrutiny standard of equal protection review because the ordinance burdens a critical aspect of plaintiff's existence, his right to pursue

in *Shapiro* and non-emergency medical care in *Maricopa*.[79] Indeed, it would be ludicrous for this Court to find that it is unconstitutional to impose a durational residency requirement on an individual seeking welfare, but it is permissible to impose the very same requirement on an individual seeking access to employment in order to escape welfare.[80]

Admittedly, bona fide residency requirements have been upheld for municipal employees.[81] However, in

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his livelihood; a right that is as much 'a basic necessity of life' as welfare assistance, non-emergency medical care and voting were found to be in earlier Supreme Court decisions. (citations omitted).

Id. 1041.

80. Curiously, the Attorney General of the State of New Jersey has taken two contradictory positions in litigation before this Court and in *Neshaminy Constructors, Inc. v. Krause, supra*, which is now pending before the New Jersey Supreme Court. *Neshaminy Constructors* involves a challenge to the constitutionality of N.J.S.A. 34:9-2, which requires that with respect to construction contracts awarded by the State or any other public body that "preference in employment thereon shall be given to citizens of the State of New Jersey who have *resided and maintained domiciles with the state for a period of not less than one year immediately prior to such employment*." (emphasis added). The State in its brief to the New Jersey Supreme Court, filed on January 13, 1983, unequivocally stated that the durational residency requirement is unconstitutional: "The State concedes, as it did before the trial court and the Appellate Division, that that portion of N.J.S.A. 34:9-2 which goes beyond a bona fide residence requirement and mandates that persons reside and maintain a domicile in New Jersey for at least a one year period prior to employment on public construction projects cannot survive scrutiny under the United States Supreme Court decisions invalidating such clauses as inconsistent with the Equal Protection principles applicable to laws distinguishing new residents from old." (citations omitted.) Brief and Appendix For Appellant — Intervenor, The State of New Jersey at 5. We note no difference between the durational residency requirement of the State statute and that of the Camden ordinance.

81. *See, e.g., McCarthy v. Philadelphia Civil Service Comm'n, supra*, (fire department employee); *Wright v. City of Jackson, Mississippi*, 506 F.2d 900 (5th Cir. 1975) (fire department employees);

each of these cases, the courts have consistently distinguished between continuing residency requirements at the time of employment, which are permissible, and durational residency requirements prior to employment, which the courts have indicated are invalid.[82] Thus, in *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645 (1976) a *per curiam* opinion upholding a continuing residency requirement for municipal employees, this Court stressed:

> We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus, in *Shapiro* . . . we stated: 'The residence requirement and the one-year waiting period requirement are distinct and independent prerequisites,' And in *Memorial Hospital* . . . quoting *Dunn* . . . the Court explained that *Shapiro* and *Dunn* did not question 'the validity of appropriately defined and uniformly applied bona fide residence requirements.' (citations omitted)

Id. 647. Here, by its very terms, Camden is penalizing all individuals who have recently exercised their right to travel, by unlawfully preconditioning access to employment opportunities upon length of municipal

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NOTE — (*Continued*)

Wardwell v. Board of Education of City School District, 529 F.2d 625 (6th Cir. 1976) (school teacher); *Andre v. Board of Trustees of Village of Maywood*, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (municipal employee); *Detroit Police Officers Association v. City of Detroit*, 385 Mich. 519, 190 N.W.2d 97 (1971), *app. dismissed*, 405 U.S. 950 (1972) (police officer).

82. *Wright v. City of Jackson, supra*, 506 F.2d at 902; *Wardwell v. Board of Education, supra*, 529 F.2d at 627-28; *Andre v. Board of Trustees of Village of Maywood, supra*, 561 F.2d at 52-3; *Mogler v. Sevier County School District*, 540 F.2d 478, 483 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

.residency.[83] In upholding the Camden resident hiring quota, the New Jersey Supreme Court completely ignored the vital distinction that this Court and lower courts have drawn between continuing and durational residency requirements.

The right of interstate travel is basic to our constitutional scheme of values.[84] It would be a hollow right and empty promise if cities such as Camden were able to pe-

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83. Indeed, the City of Camden is imposing far more onerous residency restrictions on private employment in relation to public works construction than it imposes on its own employees. Thus, the City is precluded from requiring teachers (N.J.S.A. 18A:26-1.1), police (N.J.S.A. 40A:14-122.1) or fire department employees (N.J.S.A. 40A: 14-9.1) to be municipal residents. Although Camden by ordinance adopted July 23, 1981 (Ordinance MC 1760) requires other officers and employees to be city residents, that ordinance does not impose any *durational* residency requirement. The ordinance also provides for a broad exemption for professional employees who are not required to live in the City. Moreover, there is no durational residency requirement imposed on the Affirmative Action Review Council, which is the body designed to facilitate implementation of the Camden resident hiring ordinance at issue in the case *sub judice* (A39-A40; A53). Thus, while private employees seeking access to public works construction jobs are required to be municipal residents for a year or longer, no such requirement is imposed on the City attorney defending the ordinance, the affirmative action council implementing the ordinance, or any other municipal employee.

84. Americans continue to be a highly mobile people and durational residency restrictions like the Camden ordinance, if upheld, may have a potentially devastating impact. According to the United States Census Bureau, between 1975 and 1980, over 91 million Americans, or 45.1 per cent of the population over age five, moved at least once. Approximately eighteen and one half million of those moved to a different state and 53.1 per cent of those moving were unemployed. Almost seven and a half million of the people who moved were employed in crafts or were laborers. U.S. DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, No. 368, *Geographical Mobility: March 1975 to March 1980* (1982).

nalize individuals by denying them access to private employment opportunities every time they chose to exercise that right.

B. The Camden Ordinance's Durational Residency Requirement Is Not Necessary to Promote a Compelling State Interest.

Because the Camden ordinance's durational residency requirement penalizes the fundamental right of interstate travel by limiting access to private employment opportunities, it is subject to strict scrutiny. Under this standard, the classification created by the residency requirement is unconstitutional unless it is necessary to promote a compelling state interest. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 (1974), *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Camden's purported interest in enacting its long term resident hiring quota is to alleviate unemployment. Although such a goal may be laudable, Camden has chosen impermissible means to achieve its objectives. At the outset, it is important to note that the City has less authority to achieve its goals by imposing residency requirements on private employees, who are neither hired nor controlled by the City, than it does on public employees. The Minnesota Supreme Court clearly articulated this distinction in *Berg v. City of Minneapolis*, 274 Minn. 277, 143 N.W. 2d 200 (1966) in which that court, in upholding a continuing residency requirement for police officers, distinguished *Construction and General Labor Union Local 563 v. City of St. Paul*, 270 Minn. 427, 134 N.W. 2d 26 (1965), (which had struck down a St. Paul ordinance compelling contractors who performed work for the City to employ only county residents) by stating:

> It did not involve government employment but dealt with the subject of people engaged in construction and general labor for contractors doing work on a city project. Such work does not involve public ser-

> vice of a kind which is considered permanent, is not integral to the welfare of the community nor a public service relied upon by citizens of the community in their everyday life. It does not disturb the well-established rule that public employment is not a right but a privilege, and the legislature may give the municipality the authority to impose reasonable restrictions upon the activities of employees of the municipality as a part of their terms of employment . . . (citations omitted).[85]

Thus, none of the justifications which could support residency requirements when a city acts as employer and which were relied upon by the New Jersey Supreme Court to uphold the Camden durational residency requirement[86] are relevant when a city seeks to use its financial resources to control hiring in the private market.

Moreover, Camden cannot reduce unemployment by denying newcomers access to private jobs on public works construction. Just as *Maricopa* held that the County could not fence out new residents in favor of long term residents, 415 U.S. at 266, and *Shapiro* held that the State could not deny welfare benefits to new residents, even if doing so increased benefits to older residents,[87] Camen cannot bar newcomers from access

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85. *Berg*, 274 Minn. at 281, 143 N.W. 2d at 203.

86. A27-A28.

87. As this Court explained in *Shapiro v. Thompson*, *supra*, 394 U.S. at 631-632:

> More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving . . . than a mother who moves into a particular State in order to take advantage of its better educational facilities.

to forty per cent of the jobs in order to favor residents of one year or more.[88] Unemployed newcomers are just as deserving to share in the community's benefits[89] and just as needy as longer term residents. The city's duty to reduce unemployment is as much a duty to the newcomer as it is to the citizen of many years. *Cf. C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York*, 412 F. Supp. 1164, 1170 (E.D.N.Y. 1976), *aff'd mem. sub. nom., Lefkowitz v. C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977) (Equal Protection Clause violated by state statute requiring that employment preference on public works construction projects be given to New York citizens over resident aliens).

Moreover, even assuming *arguendo* that the means chosen to eliminate unemployment are permissible, those means are invalid unless they are precisely tailored to accomplish the stated governmental objectives:

> It is not sufficient for the State to show that durational residence requirements further a very

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88. Following this Court's reasoning in *Shapiro* and *Maricopa*, lower courts have uniformly rejected the reasoning that unemployment can be reduced at the expense of excluding new residents from access to employment. As stated in *Justice v. Manzagol*, 11 E.P.D. ¶10, 758 (D.N.M. 1976):

> The one year durational residence requirement, however, helps the unemployment situation only by fencing out the competition from other States. Certainly the State is providing more opportunity for its residents to find employment by limiting the competition for jobs. On the other hand, the aforementioned 'fencing' is just as certain an impermissible restraint on one's right to interstate travel.

Similar sentiments are expressed in *State v. Wylie*, 516 P.2d 142, 149 (Alaska 1973).

89. In striking down numerous employment restrictions that have been placed on aliens, this Court has repeatedly rejected justifications that employment is a scarce resource that needs to be reserved for citizens or that employment should be reserved for those who have made a greater contribution to the community. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634, 641-45 (1973) (state civil service); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 605-06 (1976) (civil engineers.)

> substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be tailored to serve their legitimate objectives . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose, 'less drastic means' . . . (citations omitted).

Dunn v. Blumstein, supra, 405 U.S. at 343.

The classification employed by the Camden ordinance is not even remotely tailored to further the City's purported interest in reducing unemployment. Rather than targeting the employment preference to the long term unemployed, the ordinance merely benefits long term residents, regardless of their employment status. In addition, rather than increasing the number of jobs, the ordinance simply limits the universe of those who may compete for them. Certainly, there are far less restrictive and less onerous means available to the City to reduce its unemployment problem than seeking to solve it at the expense of newcomers to the City.[90]

Moreover, nothing in *Sosna v. Iowa,* 419 U.S. 393 (1975) compels a contrary result. In that case, the Court specifically reaffirmed its holdings in *Shapiro, Dunn* and *Maricopa,* 419 U.S. at 406, but upheld a one year waiting period before new residents could file for divorce.

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90. Instituting job training programs, for example, would be a less drastic method of accomplishing the city's professed goal of reducing unemployment. While aiding the unskilled long term unemployed, job training programs would not impose any burden on the right of interstate travel. Such programs could reduce unemployment in Camden without fencing out new residents from available job opportunities. *See State v. Wylie,* 516 P.2d 142, 149 (Alaska 1973).

The Court stressed that such a residency requirement did not severely penalize the right to interstate travel because the appellant was not "irretrievably foreclosed from obtaining some part of what she sought," *Id.* 406, an immediate divorce was not vital to a new resident and because of the state's traditionally paramount interest in regulating domestic relations. *Id.* 406-409.[91]

Here, by contrast, the denial of employment opportunities effected by the Camden ordinance irretrievably deprives all residents who have lived in Camden less than a year of the opportunity to pursue their chosen livelihood.[92] Furthermore, the problem of unemployment is of national scope, and the City's interest in regulating employment in the private market is not comparable to a state's paramount and longstanding historical interest in regulating domestic relations.[93] Thus, Mr. Justice Stevens commented recently in *Clements v. Fashing*, ___ U.S. ___, 102 S. Ct. 2836, 2849 n.2 (1982) (concurring opinion): "The Federal Constitution does, of course, impose significant constraints on a state government's employment practices," and this Court has consistently recognized that the federal interest in protecting rights under the Fourteenth

91. "The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States." *Id.* 404.

92. *See Hassan v. Town of East Hampton*, 502 F. Supp. 1034, 1041 (E.D.N.Y. 1980) ("Unlike the Iowa statute considered and upheld in *Sosna* which allows a patient Iowa petitioner to ultimately obtain the desired Iowa divorce adjudication, a similarly patient East Hampton shellfisherman cannot live in the town for one year and then regain the lost opportunity to pursue his livelihood for the statutory waiting period.")

93. Thus, in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859), this Court said: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . ." Similarly, in *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), the Court recognized: "The State . . . has absolute right to prescribe the condition upon which the marriage relation between its own citizens shall be created and the causes for which it may be dissolved."

Amendment, at stake here, far outweighs a state's interest in regulating employment.[94]

Finally, *Sosna* stressed that the waiting period achieved Iowa's goals of protecting the person and property of the defendant spouse, avoiding intermeddling by the foreign state in marriages in which other states have overriding interests and insuring full faith and credit for the foreign state's divorce decrees. *Id.* 407-409. In contrast, the Camden resident preference is not reasonably tailored to effectuate the ordinance's purposes.[95]

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94. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-455 (1976). Under the Commerce Clause, the state's sovereignty in the area of employment may be greater. *National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976). But in a recent case decided under the Commerce Clause, *Equal Employment Opportunity Commission v. Wyoming*, ___ U.S. ___ 103 S. Ct. 1054, (1983), this Court refused to defer to the state's interest in regulating employment, holding that the federal interest in preventing age discrimination outweighs the state's interest in prescribing a mandatory retirement age for its employees.

95. Alternatively, the Camden resident preference ordinance is violative of the Equal Protection Clause because it constitutes a deprivation of state citizenship. The citizenship clause of the Fourteenth Amendment forbids a state from denying state citizenship to a citizen of the United States residing within its borders. Although the grant of state citizenship does not carry with it any specific affirmative entitlements, classifying bona fide residents solely on the basis of when they attained their citizenship is offensive to the underlying vision of the Fourteenth Amendment:

> The Fourteenth Amendment guarantees the equal protection of the law to anyone who may be within the territorial jurisdiction of a State. That Amendment does not suggest by its terms that equal treatment might be denied a person depending upon how long that person *has been* within the jurisdiction of the State . . . [T]he Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence. And the Equal Protection Clause would not tolerate such distinctions.

Zobel v. Williams, 102 S. Ct. at 2317-2318 (Brennan, J., concurring).

Once someone becomes a member of a political community, he or she should be treated like all other members of that community, with equal rights and responsibilities. However, Camden, by conditioning access to private employment to residents of a year or

Regardless of the test adopted, the Camden resident preference must fail. By excluding new residents from access to private sector employment opportunities and granting an absolute preference to long term city residents regardless of their employment status when far less restrictive alternatives are available, the City has selected a purported cure which is not even remotely suited to relieve the malady. Reducing unemployment may constitute a valid municipal interest, but it may not be achieved by means which are repugnant to fundamental constitutional rights.

CONCLUSION

For the foregoing reasons, we respectfully urge that the judgment of the New Jersey Supreme Court be reversed and the Camden resident hiring quota be declared unconstitutional.

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longer, is implicitly stating that some citizens are less worthy than others. *See Afroyim v. Rusk*, 387 U.S. 253, 262 (1967) ("Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit").

Certainly, some distinction between citizens may be necessary for proof of bona fide citizenship or for proof of allegiance and attachment to the community. *Cf. Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973) (seven year citizenship requirement to run for governor). But in the case *sub judice*, the City of Camden is saying that "some citizens are more equal than others" in the area of access to private employment opportunities. Such discrimination based solely upon duration of residency was explicitly rejected when this nation adopted the Equal Protection Clause. *Zobel v. Williams, supra*, 102 S. Ct. at 2318-2319 (Brennan, J., concurring).